No. 14-361

Title:	Samuel Ocasio, Petitioner
	v.
	United States
Docketed:	September 29, 2014
Linked with 14A59	
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(12-4462)
Decision Date:	April 29, 2014
Rehearing Denied:	May 28, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
Jul 16 2014	Application (14A59) to extend the time to file a petition for a writ of certiorari from August 26, 2014 to September 25, 2014, submitted to The Chief Justice.
Jul 18 2014	Application (14A59) granted by The Chief Justice extending the time to file until September 25, 2014.
Sep 25 2014	Petition for a writ of certiorari filed. (Response due October 29, 2014)
Oct 23 2014	Order extending time to file response to petition to and including November 28, 2014.
Nov 24 2014	Order further extending time to file response to petition to and including December 29, 2014.
Dec 29 2014	Brief of respondent United States in opposition filed.
Jan 13 2015	Reply of petitioner Samuel Ocasio filed.
Jan 14 2015	DISTRIBUTED for Conference of February 20, 2015.
Feb 23 2015	DISTRIBUTED for Conference of February 27, 2015.
Mar 2 2015	Petition GRANTED.
Mar 27 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 1, 2015.
Mar 27 2015	The time to file respondent's brief on the merits is extended to and including August 3, 2015.
May 20 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioner.
Jun 1 2015	Joint appendix filed. (Statement of costs filed.)
Jun 1 2015	Brief of petitioner Samuel Ocasio filed.
Jun 8 2015	Brief amici curiae of Former United States Attorneys filed.
Jun 8 2015	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jul 29 2015	SET FOR ARGUMENT on Tuesday, October 6, 2015.
Jul 30 2015	Brief of respondent United States filed.

Aug 7 2015	CIRCULATED.
Aug 12 2015	Record requested from U.S.C.A. 4th Circuit.
Aug 31 2015	Reply of petitioner Samuel Ocasio filed. (Distnbuted)
Sep 15 2015	Record received from U.S.C.A. 4th Circuit is electronic and located on PACER with the exception of a SEALED electronic document.
Oct 6 2015	Argued. For petitioner: Ethan P. Davis, San Francisco, Cal. For respondent: Allon Kedem, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

Supreme Court, U.S.
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No. 14-361

In the
Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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September 25, 2014

QUESTION PRESENTED

The Hobbs Act defines extortion, in relevant part, as "the obtaining of property from another, with his consent, under color of official right." 18 U.S.C. § 1951(b)(2). This Court has held that a public official violates that statute when he "obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992).

The question presented, on which the Fourth and Sixth Circuits explicitly disagree, is:

Does a conspiracy to commit extortion require that the conspirators agree to obtain property from someone outside the conspiracy?

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PETITION FOR A WRIT OF CERTIORARI

This petition presents a clean split between the circuits on a question of statutory interpretation concerning the Hobbs Act. That question is whether a conspiracy to extort "property from another" requires the government to show that the conspirators agreed to obtain property from someone *outside* the conspiracy. Expressly disagreeing with the Sixth Circuit, the court below held that the answer is no; a defendant may be convicted of conspiring to extort "property from another" even when the "another" is a co-conspirator. The Sixth Circuit held the opposite, reasoning that the conspirators must have agreed to obtain property from someone *outside* the conspiracy. The Sixth Circuit's decision accords with the plain text of the statute and respects this Court's admonition that, "under our constitutional system federal crimes are defined by statute rather than by common law." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 490 (2001). The decision below, on the other hand, threatens a dangerous expansion of the law of extortion beyond what its text can bear. Certiorari should be granted.

OPINIONS BELOW

The opinion of the court of appeals is reported at 750 F.3d 399. *See* App. 1–29. The relevant orders of the district court are unreported. *See* App. 30–44.

JURISDICTION

The court of appeals rendered its decision on April 29, 2014. A timely petition for rehearing was denied on May 28, 2014. On July 18, 2014, the Chief Justice extended the time for filing a petition to and including September 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

Petitioner was charged with committing extortion under the Hobbs Act by receiving a bribe in exchange for official acts. In a published opinion, the court of appeals held that, in addition to committing the substantive offense of extortion, petitioner conspired to commit extortion with those who allegedly paid the bribe. App. 1–29. In so doing, the Fourth Circuit created a conflict of authority with the Sixth Circuit, which has held that a conspiracy to commit extortion requires an agreement to obtain property from someone *outside* the conspiracy. *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007).

1. This case concerns a kickback scheme. Two brothers, Hernan Alexis Moreno Mejia ("Moreno") and Edwin Javier Mejia ("Mejia"), jointly owned and operated the Majestic Auto Repair shop in Rosedale, Maryland, near Baltimore. App. 2. Over the course of several years, Moreno and Mejia began paying Baltimore police officers to encourage car-accident victims to send their vehicles to the shop for repair. App. 5–6. As Moreno explained at trial, the benefit of this scheme was that police officers are "the first people to go to [accident] scenes," and could effectively route business to Moreno and Mejia that might otherwise go to other repair shops. C.A.4 J.A. 337. Referral fees started out at $150 apiece, but eventually increased to $300. App. 6. By 2011, some sixty officers were making referrals to the brothers, accounting for some 95%–100% of their business. C.A.4 J.A. 337, 351.

In March 2011, following an extensive investigation, the Federal Bureau of Investigation

arrested Moreno, Mejia, and seventeen Baltimore police officers, including petitioner Samuel Ocasio. C.A.4 J.A. 18. Moreno and Mejia accepted plea agreements in exchange for their cooperation with the government, as did most of the officers involved. App. 3.

Petitioner, along with Officer Kelvin Quade Manrich (whom petitioner did not know), pleaded not guilty and demanded a jury trial. The two men were tried jointly, even though they had nothing in common apart from this prosecution: None of the specific acts of extortion alleged against Ocasio involved Manrich in any way (or vice versa). The two men patrolled different areas of the city, and until their arrests had never heard of each other. C.A.4 J.A. 80, 221–22. As explained below, the justification for the joint trial was that both men were charged with involvement in the same conspiracy.

2. The government's legal theory was that officers who accepted money from Moreno and Mejia committed extortion in violation of the Hobbs Act, 18 U.S.C. § 1951(a). That provision defines extortion, in relevant part, as the wrongful "obtaining of property from another, with his consent, under color of official right." *Id.* § 1951(b)(2). Under this Court's decision in *Evans v. United States*, 504 U.S. 255 (1992), a public official commits extortion whenever he "obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts"—in other words, if he takes a bribe. *Id.* at 268.

The superseding indictment charged petitioner and Manrich with conspiracy to commit extortion

(Count One) and with three counts each of substantive extortion (in petitioner's case, Counts Five through Seven). App. 3–5. Each substantive count referred to a specific incident on which one of the defendants allegedly accepted a payment from Moreno and Mejia in exchange for referring an accident victim to them. *Id.*

The crux of this petition concerns the legal validity of Count One—the conspiracy charge. That count alleged that petitioner conspired "with Moreno and Mejia to obstruct, delay, and affect commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain under color of official right, money and other property from Moreno, Mejia, and [the Majestic Repair Shop], with their consent in violation of [the Hobbs Act]." App. 4. In other words, it accused the defendants of conspiring *with their bribers* to obtain property *from the bribers themselves*.

Petitioner argued below that Count One fails to state an offense. App. 13–15. Petitioner relied primarily on the Sixth Circuit's decision in *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007) (Sutton, J.), which held that, in order to conspire to obtain property "from another," conspirators must agree to obtain property from someone outside the conspiracy.

Citing the Fourth Circuit's decision in *United States v. Spitler*, 800 F.2d 1267 (4th Cir. 1986), the district court rejected that argument. The court refused petitioner's proposed jury instruction that he must be acquitted if "the only person or persons from whom [he] conspired to obtain money were also members of the conspiracy." App. 14 n.9; App. 30–31.

The district court also denied petitioner's motion for a judgment of acquittal on the same grounds. App. 14–15; App. 38–44.

3. As a result of the conspiracy charge, petitioner's trial saw a great deal of evidence (offered to prove the conspiracy) that otherwise would not have been admitted. That included not only evidence of Manrich's conduct (Counts Two through Four), but evidence that petitioner made additional referrals to Moreno and Mejia (that is, additional acts of substantive extortion) that were not charged in the indictment. App. 18 n.11. The jury also heard extensive evidence about an occasion on which petitioner sent *his own car* to Moreno and Mejia's shop for repair, and allegations that Moreno and Mejia fraudulently added damage to that car and then sought reimbursement from petitioner's insurer, GEICO, which in turn sought subordination of the claim from Erie Insurance Co. App. 12–13.

On the final day of trial, Manrich withdrew from the proceedings and pleaded guilty. App. 15. The district court instructed the jury that because Manrich's acts of extortion were charged as overt acts in furtherance of the conspiracy, it could consider those acts when deliberating on the conspiracy charge. App. 18 n.11.

The jury found petitioner guilty on all counts, and the district court sentenced him to eighteen months of imprisonment and three years of supervised release. App. 15. It also ordered him to make restitution to two parties under the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3663. *First*, it ordered petitioner to make restitution to the

Baltimore Police Department in the amount of $1,500.00. App. 15. That amount reflected $300 for each of five separate acts of referring accident victims to Moreno and Mejia—including the three acts charged as substantive extortion counts in the indictment *plus* two others that were not charged but about which evidence was submitted at trial. App. 32–37. *Second*, the district court concluded that the fraudulent insurance claim filed with Erie was part of the conspiracy, and therefore ordered petitioner to pay Erie $1,870.58 in restitution. App. 15–16.

4. In a published opinion, the court of appeals affirmed petitioner's conviction and sentence, except that it vacated the restitution award to Erie as unauthorized by statute.[1] App. 25–28. As for the conspiracy charge, the Fourth Circuit reaffirmed the approach it announced in *Spitler* and explicitly rejected the Sixth Circuit's "contrary" holding in *Brock*. App. 19–25.

As the panel explained, *Spitler* concerned an employee of a state contractor who was convicted of conspiring with a state official to extort the contractor's employer. App. 20; *see Spitler*, 800 F.2d

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[1] The court explained that, under the VWPA, a district court may not order restitution where the harm to be remedied "does not result from conduct underlying an element of the offense of conviction, or conduct that is part of a pattern of criminal activity that is an element of the offense of conviction." App. 27 (quoting *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996)). Because petitioner was neither charged with nor convicted of insurance fraud, the court held that petitioner could not be ordered to pay restitution "as though he w[ere] . . . convicted of that offense." App. 28.

at 1278–79. The defendant argued that he could not be convicted of conspiracy to commit extortion because he was really a *victim* of that conspiracy—*i.e.*, the person through whom the corrupt state official had exerted coercive influence against the contracting company—and could not be charged with conspiracy merely by virtue of his "acquiescence" in the coercion. *See id.* The Fourth Circuit rejected that defense. According to the panel below, *Spitler* "recognized the extremes of a spectrum of conduct ranging from 'mere acquiescence' (which is not punishable under conspiracy principles) to active solicitation and inducement" (which is). App. 20–21. Under *Spitler*'s approach, the question is whether the payor played an active role in the conspiracy. *Id.*

Applying that rule, the panel held that "a person like Moreno and Mejia, who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme, can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement." App. 22.

The panel also considered and rejected arguments based on what it described as the Sixth Circuit's "contrary *Brock* decision." App. 21. The panel acknowledged that *Brock* "focused on the language of the Hobbs Act," App. 22, reasoning that "an agreement to obtain 'property from *another*' [means] an agreement to obtain property from someone outside the conspiracy," *id.* (quoting *Brock*, 501 F.3d at 767), and that the textual requirement that the conspirators agree to obtain "'property from another' and do so 'with his consent'" does not "appl[y] naturally to the conspirators' own property

or to their own consent," *id.* (quoting *Brock*, 501 F.3d at 768). The panel concluded, however, that the Act's "from another" language "provides only that a public official cannot extort himself," App. 23, and that *Spitler*'s active-participation requirement ensured that the "consent" element would not make a conspiracy out of every act of extortion, App. 23–24.

The panel therefore "refuse[d] to abandon our *Spitler* precedent and adopt the Sixth Circuit's analysis in *Brock*." App. 25. In a footnote, the panel "further observe[d]" that it believed petitioner's *Brock* theory "factually flawed" because, in addition to Moreno and Mejia, "dozens of [other] BPD officers" had participated in the extortion scheme, and the jury "was entitled to find each of those BPD officers to be Ocasio's coconspirator, regardless of whether Ocasio even knew him." App. 25 n.14. Notably, however, the government had never advanced that theory—not in the indictment (which does not allege it), at trial, in closing arguments to the jury, in the jury instructions, or in its briefs on appeal.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision is incorrect and explicitly conflicts with a decision of the Sixth Circuit about the interpretation of a federal criminal statute. While the Sixth Circuit's approach respects Congress's prerogative to define federal crimes, the decision below is unmoored from the statutory text. The disagreement between the courts of appeals is important and warrants this Court's review.

I. The Fourth Circuit's Decision Explicitly Creates a Conflict with the Sixth Circuit's Interpretation of the Hobbs Act.

The decision below explicitly creates a conflict of authority with another court of appeals. In *United States v. Brock*, the Sixth Circuit held that to conspire to obtain "property from another, with his consent, under color of official right," 18 U.S.C. § 1951(b)(2), conspirators must have "formed an agreement to obtain property from someone outside the conspiracy." 501 F.3d at 767. The panel below, however, expressly declined to follow the "contrary *Brock* decision." App. 21. Instead, it reaffirmed conflicting circuit precedent, holding that anyone who "actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement." App. 22 (citing *Spitler*, 800 F.2d 1267); *see also* App. 24 n.13 (question is whether payor was "an active participant in the extortion scheme").

Those approaches are irreconcilable, as *Brock*'s materially identical facts illustrate. Like this case, *Brock* involved two brothers accused of paying bribes to a public official to benefit their jointly owned business. Michael and Jerry Brock co-owned a bail-bond company, Brock Bonding. They paid a county court clerk to remove their clients' bail-bond forfeiture hearings from the court's calendar. 501 F.3d at 765. As a result of this scheme, the Brock brothers were convicted of conspiracy to commit extortion under the Hobbs Act.

In a careful opinion by Judge Sutton, the Sixth Circuit reversed the Brocks' convictions. The court held that "[t]o be covered by the statute, the alleged conspirators—the Brocks and Simcox (the court clerk)—must have formed an agreement to obtain 'property from another,' which is to say, formed an agreement to obtain property from someone outside the conspiracy." *Id.* at 767 (quoting 18 U.S.C. § 1951(b)(2)). In that court's view, "[t]hese three people did not agree, and could not have agreed, to obtain property from 'another' when no other person was involved—when the property, so far as the record shows, went from one coconspirator (one of the Brocks) to another ([the clerk])." *Id.* The contrary conclusion, moreover, would coexist uneasily with § 1951's requirement that the property be obtained with the other person's "consent." *Id.*; *see also United States v. Gray*, 521 F.3d 514, 533–34 (6th Cir. 2008) (applying *Brock* to reverse several convictions for conspiracy to commit extortion).

The *Brock* court, aware of the Fourth Circuit's decision in *Spitler*, attempted to distinguish that

case. As noted above, the defendant in *Spitler* was the *employee* of a state contractor (a company called TEI) who conspired with a public official to extort money from TEI. 800 F.2d at 1269-70. *Brock* observed that because "Spitler facilitated the extortion of TEI's property, not his own," 501 F.3d at 769, the case did not present the question whether a conspiracy charge could stand without the presence of a third party. By contrast, in *Brock* itself, (as indeed in this case) "the supposed point of the extortion conspiracy, so far as the evidence shows, was to extort the Brocks' cash payments, which apparently came out of the Brocks' bank accounts or Brock Bonding's bank account not property from an unrelated entity outside the conspiracy." *Id.* (citations omitted).

In the opinion below, the Fourth Circuit rejected that distinction and *Brock* in favor of doubling-down on *Spitler*'s amorphous (and assuredly atextual) active-participation standard. As the panel explained, "[t]he propriety of Spitler's conspiracy conviction rested not on whether some other victim could be identified, but on whether Spitler was a mere victim of—rather than an active participant in—the extortion scheme." App. 24 n.13. It further held that "[n]othing in the Hobbs Act forecloses the possibility that the 'another' can also be a coconspirator of the public official." App. 23. That holding undoubtedly creates a circuit split; the entire point of *Brock* is that the Hobbs Act *does* foreclose the possibility that "another" can be a member of the conspiracy. The decision below therefore squarely conflicts with *Brock*. Had petitioner been a police

officer in Detroit, there is little doubt the conspiracy charge would have been held invalid.

This Court should settle the circuits' disagreement. Because both the Fourth and Sixth Circuits have carefully examined and rejected each other's interpretations (and attempts to distinguish away differences have failed), there is no reason to imagine the conflict will be resolved without this Court's intervention.

II. The Decision Below Is Inconsistent with the Plain Text of the Hobbs Act.

In the dispute between the Fourth and Sixth Circuits, there is a clear winner: The Sixth Circuit's approach is moored in the text of the Hobbs Act, along with considerations of lenity and longstanding congressional practice in the area of bribery crimes. The Fourth Circuit's, by contrast, is a vague and malleable standard inappropriate for criminal statutes.

The text of the Hobbs Act requires that a conspiracy involve an agreement to obtain *someone else's* property. It defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). If two people agree that one will pay the other a bribe, no speaker of English would say they have agreed to "obtain property from another, with his consent."[2]

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[2] Imagine such a conversation: John, a policeman, says to Susan, a civilian, "Let us obtain property from another, by

That is so for two reasons. *First*, their agreement does not concern "another" at all—only themselves. The panel below dismissed this argument on the ground that the "from another" language in § 1951(b)(2) "provides only that a public official cannot extort himself." App. 23. The suggestion that *that* was Congress's purpose in including this phrase is absurd. No statutory language is necessary to confirm the metaphysical impossibility of paying oneself a bribe with one's own money.

Second, in no sense have they "conspired" to obtain anyone's "consent" as the statute requires. As *Brock* put it, "[h]ow do (or why would) people conspire to obtain their own consent?" 501 F.3d at 767. And "[t]he context in which the consent requirement appears confirms that it must be taken seriously" because "[t]he Hobbs Act prohibits not only extortion but robbery as well; what separates the two is the payor's consent," meaning that "[f]ailure to respect the consent requirement blurs the line between robbery and extortion." *Id.* at 767–68.

As *Brock* explained, a number of interpretive principles support its reading of the text. Most importantly, the Fourth Circuit's reading would transform every payment of a bribe into a criminal conspiracy, thus "effectively transform[ing] the

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getting her consent through promise of my official action." Susan then asks, "Who did you have in mind?" If John then replies, "Oh, I meant *you* should pay me," Susan would rightly be confused. No one speaks that way—and there is no reason to imagine Congress expected citizens reading a criminal statute to do so.

[Hobbs] Act into a prohibition on *paying* bribes to public officials." *Id.* at 768 (emphasis added). This Court has never construed the Act to impose criminal liability on the *payor* of a bribe, and certainly the substantive offense of extortion does not directly do so. As Judge Sutton pointed out, *see id.*, when Congress wishes to criminalize paying a bribe, it does so directly. *See, e.g.*, 18 U.S.C. § 201(b)(1) (making it an offense to "give[], offer[] or promise[] anything of value to any [federal] official"); *id.* § 210 (making it an offense to "pay[] or offer[] or promise[] any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person"); *id.* § 212(a) (making it an offense for "an officer, director, or employee of a financial institution" to loan or give money to a federal examiner "who examines or has authority to examine such institution"); *id.* § 226(a)(1) (making it an offense to compromise the security of "any secure or restricted area or seaport" by "corruptly giv[ing], offer[ing], or promis[ing] anything of value to any public or private person"). "Having opted not to punish the giving of bribes directly, Congress should not be treated as having prohibited them through the sleight of indictment of an extortion conspiracy. Indeed, under the government's theory of prosecution, it is difficult to see what independent role these other federal statutes play." *Brock*, 501 F.3d at 768.

A related problem is that the government's theory also transforms every act of *receiving* a bribe into a conspiracy. Every act of taking a bribe punishable as extortion involves an agreement

between the payor and the payee and, thus, a conspiracy. That cannot be the law—any more than every sale of illegal drugs (which also involves an agreement between two parties) is automatically a conspiracy to distribute drugs. *See, e.g.*, *United States v. Hackley*, 662 F.3d 671, 679 (4th Cir. 2011); *United States v. Townsend*, 924 F.2d 1385, 1394 (7th Cir. 1991).

The Fourth Circuit attempted to solve that problem by engrafting onto the Hobbs Act an amorphous exception that applies when the payee does not actively participate in the conspiracy—meaning, one supposes, when he is not pleased with the corrupt bargain he has made. That has no basis in the text of the statute. *Accord Brock*, 501 F.3d at 771. Worse, it is an unworkable standard that borders on unconstitutionally vague. "Because all Hobbs Act prosecutions require the 'consent' of the payor, it will be difficult to ascertain what level of enthusiasm, ambivalence or regret is required to escape prosecution." *Id.*

The Fourth Circuit has no solution to that problem. It has explicitly declined to "declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator." *Spitler*, 800 F.2d at 1278. Yet a criminal statute that sets out no easily identified "bright line" between innocent and criminal conduct is fundamentally inconsistent with due process. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). This Court has been careful to interpret federal criminal statutes to avoid those vagueness

concerns. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358, 403–04 (2010).

At bottom, the Fourth Circuit's approach is designed to find a conspiracy when the court thinks the payor is a malefactor and none when he is not. But federal courts have no common-law power to punish wrongdoing not described in a statute, *see United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), and in any case, "[b]ad men, like good men, are entitled to be tried and sentenced in accordance with law," *Sorich v. United States*, 555 U.S. 1204, 1208 (2009) (Scalia, J., dissenting from denial of certiorari) (quoting *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting)).

III. The Question Presented Is Cleanly Presented and Important.

This Court should grant the petition and resolve the circuits' disagreement in this case.

The conflict is now entrenched and cleanly presented. Although there is only one court of appeals on each side of the disagreement, further percolation is not likely to resolve it. The opinion below explicitly considers and rejects the Sixth Circuit's opinion in *Brock* in favor of *Spitler*, App. 25, and *Brock* explicitly considered and rejected *Spitler*, 501 F.3d at 769–70. The dueling opinions, moreover, are thorough, comprehensive, and reflect fundamentally incompatible approaches.

It is clear that this case would have come out differently in the Sixth Circuit. Both here and in *Brock*, the alleged payors of bribes are two brothers and their jointly owned business. The Sixth Circuit

thinks that is not sufficient for conspiracy liability; the Fourth Circuit thinks it is.

Petitioner has a real stake in obtaining reversal of his conspiracy conviction. Although petitioner has been released from imprisonment, a live controversy remains about the effect of the conspiracy charge. As described above, the presence of the conspiracy charge was the basis for joining his trial with Manrich's in the first place, and also the purported justification for introducing evidence of uncharged bad acts. Because it affirmed the conspiracy conviction, the court of appeals had no need to address whether, as a consequence of the prejudicial joinder, the substantive counts must also be reversed. *See* App. 16 n.10. That question of spillover prejudice would be open to the court of appeals on remand should this Court reverse. In addition, two of the uncharged bad acts about which the jury heard evidence (uncharged allegations of substantive extortion) resulted in restitution awards that, without the conspiracy charge, would be vacated. *See* 18 U.S.C. § 3663.

In a footnote, the court of appeals expressed (for the first time in this litigation) the view that petitioner's co-conspirators perhaps were *not* Moreno and Mejia but other Baltimore Police Officers, thereby supposedly curing the *Brock* problem with the conspiracy charge. *See* App. 25 n.14. But that late-breaking suggestion does nothing to eliminate the conflict. *Brock* requires that the person from whom property is to be obtained be "someone outside the conspiracy." 501 F.3d at 767. The conspiracy charge alleged in the indictment is reproduced in the

court of appeals' opinion and is clear: Moreno and Mejia are alleged to be members of the conspiracy *and* those from whom property was to be obtained. *See* App. 4. Whether or not other Baltimore Police Officers are also members of the conspiracy, Moreno and Mejia are not "outside the conspiracy" as *Brock* requires. In any event, the court of appeals' observation should not make its opinion proof against this Court's review; the argument it advances was never made by the government, including at trial.

More fundamentally, if it is not corrected, the courts of appeals' decision in this case transforms every payment of a bribe into a conspiracy to commit extortion. The consequence would be to impose criminal liability on payors of bribes without explicit congressional authorization, and (with respect to both payors and payees) open the door in every extortion case to the expansive kinds of evidence and party-joinder rules that conspiracy charges make available to the government. Those consequences, both to the separation of powers and to the practical course of criminal justice, justify this Court's review.

Equally important is the broader principle at stake: The Hobbs Act is not authority for the creation of a federal common law of crimes, or for vague standards in the criminal law meant to substitute a court's judgment that a party is a bad actor for Congress's judgment about the elements of criminal offenses. "[U]nder our constitutional system federal crimes are defined by statute rather than by common law." *Oakland Cannabis Buyers' Co-op.*, 532 U.S. at 490; *see also United States v. Lanier*, 520

U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts.").

This Court has recently reaffirmed that bedrock principle. In *Sekhar v. United States*, 133 S. Ct. 2720 (2013), the Court reversed an opinion of the Second Circuit interpreting the crime of extortion to cover pressuring a company's general counsel to give a particular business recommendation. This Court divided on precisely why that conclusion should be reversed: The majority said it was because the general counsel's power to give his opinion is not something that could be "obtain[ed]," *id.* at 2726; Justice Alito, for three Justices, said it was because the recommendation was not "property," *id.* at 2728–29 (opinion concurring in judgment). But whatever the rationale, the unanimous point of agreement was that the Hobbs Act is a regular criminal statute, to be interpreted by reference to its words. That is what *Brock* did, and it is what the Fourth Circuit failed to do.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-4462

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

SAMUEL OCASIO,
Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Catherine C. Blake, District Judge.
(1:11-cr-00122-CCB-13)

Argued: December 11, 2013
Decided: April 29, 2014

Before MOTZ, KING, and SHEDD, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge King wrote the opinion, in which Judge Motz and Judge Shedd joined.

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* * *

KING, Circuit Judge:

In 2012, a jury found defendant Samuel Ocasio, a former officer of the Baltimore Police Department (the "BPD"), guilty of four offenses relating to his involvement in a kickback scheme to funnel wrecked automobiles to a Baltimore auto repair shop in exchange for monetary payments. Ocasio was convicted on three Hobbs Act extortion counts, *see* 18 U.S.C. § 1951, plus a charge of conspiracy to commit such extortion, *see* 18 U.S.C. § 371. On appeal, Ocasio primarily maintains that his conspiracy conviction is fatally flawed and must be vacated. He also challenges a portion of the sentencing court's award of restitution. As explained below, we affirm Ocasio's conspiracy and other convictions, vacate the restitution award in part, and remand.

I.

A.

On March 9, 2011, Ocasio and ten codefendants were indicted in the District of Maryland in connection with the kickback scheme involving payments to BPD officers in exchange for referrals to a Baltimore business called Majestic Auto Repair Shop LLC (the "Majestic Repair Shop," or simply "Majestic"). Nine of the defendants were BPD officers, and the others were Herman Alexis Moreno and Edwin Javier Mejia, brothers who were co-owners and operators of the Majestic Repair Shop. The single-count indictment alleged, pursuant to 18 U.S.C. § 371, that the defendants, along with others "known and unknown," conspired to violate the Hobbs Act, 18 U.S.C. § 1951, by agreeing to

"unlawfully obtain under color of official right, money and other property" from Moreno, Mejia, and Majestic. *See* J.A. 18.[1] As such, the initial indictment both charged Moreno and Mejia with the conspiracy offense and identified them — as well as Majestic — as victims of the extortion conspiracy.

Seven months later, on October 19, 2011, the grand jury returned a seven-count superseding indictment charging only two defendants, Ocasio and another BPD officer, Kelvin Quade Manrich, who had not been named in the initial indictment. Thereafter, the conspiracy offense in the first indictment was dismissed as to each of the other defendants, in exchange for guilty pleas. Each defendant entered into a plea agreement with the government and pleaded guilty to a separately-filed superseding information, predicated on admitted involvement in the kickback scheme.[2] In connection with their guilty pleas, the brothers Moreno and Mejia agreed that they would testify at Ocasio's trial.

Count One of the superseding indictment — naming both Ocasio and Manrich — repeated the charge of conspiring to violate the Hobbs Act, in contravention of 18 U.S.C. § 371. Counts Two through Four charged Manrich with Hobbs Act

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[1] Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

[2] Several of the BPD officer-defendants were convicted of a single count of Hobbs Act extortion under 18 U.S.C. § 1951, while other defendants were convicted of two offenses, Hobbs Act extortion and conspiring to commit extortion. On July 11, 2011, Moreno and Mejia each pleaded guilty to Hobbs Act extortion and conspiracy.

extortion, that is, extorting Moreno by "unlawfully obtaining under color of official right, money and property," in violation of 18 U.S.C. § 1951(a). *See* J.A. 55. Finally, counts Five through Seven charged Ocasio with Hobbs Act extortion of Moreno on three specific occasions — January 17, 2010, January 10, 2011, and January 15, 2011.[3]

In Count One, the superseding indictment alleged the § 371 conspiracy offense against Ocasio and Manrich in the following terms:

> From in or about the Spring of 2008, and continuing through at least February 2011, [Ocasio and Manrich], and others both known and unknown to the Grand Jury, did knowingly and unlawfully combine, conspire, confederate, and agree together, with other [BPD officers], and with Moreno and Mejia to obstruct, delay, and affect commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain under color of official right, money and other property from Moreno, Mejia, and [the Majestic Repair Shop], with their consent, not due the defendants or their official position, in violation of [the Hobbs Act].

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[3] The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). References in this opinion to Hobbs Act extortion refer to extortion committed under color of official right, as charged against Ocasio and Manrich.

J.A. 50. According to Count One, the purpose of the conspiracy was for "Moreno and Mejia to enrich over 50 BPD Officers by issuing payments to the BPD Officers in exchange for the BPD Officers' exercise of their official positions and influence to cause vehicles to be towed or otherwise delivered to Majestic for automobile services and repair." *Id.* at 51. Count One spelled out two overt acts in furtherance of the conspiracy — a December 14, 2010 phone call between Manrich and Moreno, plus a January 15, 2011 call between Ocasio and Moreno — and incorporated by reference, as additional overt acts, each of the six substantive Hobbs Act extortion counts.

B.

The prosecutions underlying this appeal were the result of an extensive investigation conducted by the BPD and the FBI. The BPD began its investigation in the summer of 2009. When federal authorities joined the investigation in late 2010, the BPD had identified approximately fifty of its officers as possibly involved in wrongdoing with the Majestic Repair Shop. In the winter of 2010, the FBI placed a wiretap on Moreno's telephone and began surveillance at both Majestic and at Moreno's residence. During the period from November 2010 to February 2011, the FBI recorded thousands of phone calls between Moreno and various BPD officers, including Ocasio and Manrich.

The trial evidence established a wide-ranging kickback scheme involving the Majestic Repair Shop

and BPD officers.[4] The scheme was fairly straightforward: BPD officers would refer accident victims to Majestic for body work and, in exchange for such referrals, the officers would receive monetary payments. The payments made to BPD officers by the Majestic Repair Shop for their referrals of wrecked vehicles were made by both cash and check, and ranged from $150 to $300 per vehicle. After the kickback and extortion scheme began, knowledge of it spread by word-of-mouth throughout the BPD.

The referral of accident victims to the Majestic Repair Shop by BPD officers in exchange for money violated the BPD's established procedures. The BPD General Orders specify that BPD officers shall not violate any state or federal laws or city ordinances, or solicit or accept any "compensation, reward, gift, or other consideration" without the permission of the Police Commissioner. *See* J.A. 49, 208–09. Pursuant to BPD General Order I-2, which specifies "towing procedures," if an accident victim in a non-emergency situation declines to contact her insurance company or other towing service (such as AAA), the BPD officer at the accident scene should call, through the BPD communications center, an already approved "Medallion towing company" to move the damaged vehicle.[5] In an emergency situation, i.e., when

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[4] Our factual recitation is drawn primarily from the trial record. In light of the guilty verdicts, we present the relevant facts in the light most favorable to the prosecution. *See Evans v. United States*, 504 U.S. 255, 257 (1992).

[5] A Medallion towing company is a pre-approved towing business that has a contract with the City of Baltimore to

conditions are hazardous or a wrecked vehicle could impede traffic or cause further injuries, BPD officers have the discretion to contact a Medallion towing company to request towing services without first securing the consent of the wrecked vehicle's owner or operator. Regardless of whether a Medallion towing company is called for a wrecked vehicle, the "owner or operator [retains] full discretion to determine the destination to which the vehicle [is] to be towed." *Id.* at 213. Majestic was not, at any point during the Count One conspiracy, a Medallion towing company.

1.

The Count One conspiracy commenced in late 2008 or early 2009. Officer Ocasio first became involved in the kickback scheme in about May 2009, when, after learning about the scheme from another BPD officer, he called Moreno to request a tow truck for an accident. Moreno and Ocasio met for the first time at the scene of that accident. From May 2009 until about February 2011, Ocasio referred numerous vehicles to the Majestic Repair Shop, and received a cash payment on each occasion. On several occasions, Ocasio — who usually worked the BPD's night shift — called Moreno from an accident scene and described the damaged vehicles. If Moreno wanted a vehicle towed to Majestic, Ocasio would convince the driver that she should use Majestic's services and then arrange for the wrecked vehicle to be towed to

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provide towing services in connection with automobile accidents.

Majestic.[6] After referring the wrecked vehicle to Majestic, Ocasio would call Moreno and request his cash payment of $300, usually by the next afternoon.

a.

Around midnight on January 17, 2010, Officer Ocasio responded to an accident scene in Baltimore. After determining that one of the wrecked vehicles was not driveable, Ocasio called the driver, a Mr. Taylor, to the BPD patrol car and gave him advice — that the Majestic Repair Shop should tow and repair Taylor's wrecked car. When Taylor told Ocasio that he had already called AAA, Ocasio convinced Taylor to cancel the AAA request and have his vehicle towed instead to Majestic. Ocasio then called Moreno to request a tow for Taylor. Almost immediately, Ocasio called Moreno again, asking him to delay his arrival at the accident scene because Ocasio's supervisor was nearby. Several minutes later, Ocasio called Moreno again to let him know that the coast was clear. Moreno, along with BPD Officer Leonel Rodriguez (who was already with Moreno when Ocasio called), arrived at the accident scene with a tow truck and towed Taylor's car to Majestic.[7] Ocasio called Moreno

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[6] Although the Majestic Repair Shop was primarily a body shop, rather than a towing company, it owned and operated a tow truck and worked with at least one other towing business. The vehicles referred to Majestic by BPD officers were either towed to Majestic by its own tow truck, or Moreno arranged for wrecked vehicles to be towed there by other towing services.

[7] Moreno explained to the jury that Officers Rodriguez and Ocasio were friends and associates, and Moreno identified Rodriguez as the BPD officer who probably introduced Ocasio to the kickback scheme. Despite knowing each other, Rodriguez

the following morning seeking his $300 cash payment for the referral.

b.

Several months later, in March 2010, a driver flagged Ocasio down around midnight to report that his vehicle had been vandalized. Ocasio, after ascertaining that the car could not be driven and was blocking a city street, recommended calling the Majestic Repair Shop. When the owner consented, Ocasio called Moreno to arrange for the tow. As a result, Moreno towed the vehicle to Majestic and performed repair work on it that was worth several thousand dollars. Ocasio called Moreno several times the next afternoon and arranged for his $300 cash referral payment.

On November 7, 2010, Officer Ocasio was again working the BPD's night shift. Around 4:00 that morning, Ocasio was called to an area of Baltimore where four parked vehicles had been hit by a fifth vehicle. Ocasio called Moreno to describe the four damaged vehicles and to *see* if Moreno would like any of them referred to the Majestic Repair Shop. During this call, Ocasio described the car that had collided with the parked vehicles, advising Moreno that it was "an Acura Legend" with "full cover," conveying to Moreno that the car at fault was a luxury vehicle and that its insurer would pay for the damages suffered by the other vehicles. *See* J.A. 416. Moreno expressed concerns to Ocasio about the values of the four damaged automobiles, questioning whether they

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and Ocasio acted as strangers when both were present at the January 17, 2010 accident scene.

would be worth towing and repairing. Ocasio then identified one of those cars as a 2006 Toyota, which interested Moreno because the Toyota was more valuable than the others. Ocasio advised Moreno that there was no need to tow the Toyota, however, because it could still be driven. In response, Moreno suggested that Ocasio "talk to" the owner of the Toyota and convince him to have it towed to Majestic. *Id.* at 419.

After Moreno and Ocasio agreed that the Toyota should be referred to the Majestic Repair Shop, Ocasio identified its owner, a Mr. Tran, through the computer in a BPD patrol car. Despite the early morning hour and the fact that the Toyota was in operating condition, Ocasio went personally to Tran's home and misrepresented the accident situation. Ocasio falsely advised Tran that the accident report had to be completed that very morning. Officer Rogich, another BPD officer who was at the scene, explained otherwise to the jury, stating that he "wouldn't have knocked on [the owners'] doors," and "would have just left" accident report forms on the windshields of the damaged cars or at the owners' doors. *See* J.A. 926. While in Tran's residence, Ocasio recommended that Majestic fix the Toyota. Ocasio then called Moreno, who arrived soon thereafter and convinced Tran to have the Toyota towed to Majestic for repairs. Moreno also gave Tran documentation reflecting that his Toyota had been towed to Majestic. Rather than towing the Toyota, however, Moreno drove it from the accident scene to Majestic. En route, Moreno stopped at a nearby convenience store and met Ocasio. While there, Moreno withdrew $300

in cash from a Majestic bank account, which was paid to Ocasio.

c.

In the early morning hours of January 10, 2011, Officer Ocasio was called to the scene of a hit-and-run accident in Baltimore to translate for an accident victim, Mr. Quintanilla, who did not speak English. Quintanilla's SUV had been damaged in the accident, and it had been pushed off the street into a yard. The first BPD officer to respond to the scene concluded that there was no need to tow the SUV Ocasio, after asking Quintanilla if he knew where the SUV could be fixed, recommended that it be towed to the Majestic Repair Shop. Ocasio then called Moreno to describe the damaged SUV, and Moreno responded by sending one of his associates to tow it to Majestic. That afternoon, Ocasio called Moreno seeking his referral fee. On January 14, 2011, Ocasio picked up Moreno at Majestic and they travelled together to a nearby ATM. Moreno then withdrew $300 in cash from a Majestic bank account and paid it to Ocasio.

d.

On January 15, 2011, Officer Ocasio made yet another referral to the Majestic Repair Shop. Shortly after 2:00 a.m., Ocasio arrived at the scene of a hit-and-run accident, being one of several BPD officers to respond. Ocasio had not been assigned to the accident by the BPD dispatcher, however, and should have been on "special detail" in another area of Baltimore. The wrecked vehicle was badly damaged and could not be driven. Ocasio did not ask the car's owner if she had a towing company or speak to her

about having her vehicle towed and repaired. He nevertheless called Moreno and requested that a tow truck be sent to the accident scene. In response, Moreno sent an associate, who had the car's owner sign paperwork authorizing the tow for her wrecked vehicle. Moreno's associate also gave the vehicle's owner a Majestic business card. Later that morning, Ocasio sent Moreno a text message asking to "pick up the money today before I go to work." J.A. 538. Ocasio then went to Moreno's home and collected $300 in cash.[8]

2.

Officer Ocasio also personally utilized the services of the Majestic Repair Shop. On January 29, 2010, Ocasio's wife was involved in a traffic accident that caused only slight damage to the rear bumper of her SUV. As a result, Ocasio called Moreno and asked that his wife's SUV be towed to Majestic. Because Ocasio's insurance company (GEICO) was unlikely to pay for such minor repairs, Ocasio overstated the SUV's damage on a GEICO claim form. Moreno then caused additional damage to the SUV — which he subsequently repaired — consistent with the damage description that Ocasio had provided to GEICO on the claim form. Ocasio's insurance claim was paid in full and, because

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[8] The events of January 17, 2010, underlie the Hobbs Act extortion offense alleged against Ocasio in Count Five of the superseding indictment; the events of January 10 and 14, 2011, underlie Count Six; and, the events of January 15, 2011, underlie Count Seven. Counts Five, Six, and Seven are, in turn, incorporated into Count One as overt acts in furtherance of the extortion conspiracy.

Ocasio's wife was not responsible for the accident, GEICO was reimbursed by the other driver's insurer (Erie Insurance) for the damage falsely claimed by Ocasio with respect to the SUV In addition to the standard $300 cash referral fee, Majestic paid Ocasio's insurance deductible and car rental fees that were not covered by the insurers. As Moreno explained at trial, Majestic made those payments in an effort to keep Ocasio happy, with the hope that he would continue referring damaged vehicles to Majestic.

On December 29, 2010, Ocasio again called on the Majestic Repair Shop's towing and repair services for his personal needs. When Ocasio's private vehicle broke down in Baltimore, he called Moreno for a tow. Moreno advised Ocasio that he would take care of the towing fee and sent a friend from another towing service to tow Ocasio's vehicle. Rather than have his automobile towed to Majestic's shop, however, Ocasio had it towed to his residence. The towing fee was $150, more than Moreno had anticipated. When Moreno asked Ocasio to split the towing fee, Ocasio agreed to do so, but thereafter reneged on that arrangement.

C.

Prior to Ocasio and Manrich's joint trial on the superseding indictment, the prosecution submitted its proposed jury instructions to the district court. In response, Ocasio made objections and submitted his own proposed instructions. Therein, Ocasio raised the primary argument that he pursues on appeal: that he could not be convicted of conspiring with Moreno and Mejia, because they were the victims of

the alleged Hobbs Act extortion conspiracy. Ocasio's argument relied on *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007), wherein the Sixth Circuit concluded that the victim of a Hobbs Act conspiracy must be a person outside the alleged conspiracy, i.e., the victim cannot also be a coconspirator in the extortion scheme.[9] The prosecution objected to Ocasio's proposed *Brock* instruction, contending that his reliance on the *Brock* decision was foreclosed by applicable precedent.

The trial began in Baltimore on February 13, 2012. On February 22, 2012, after presenting twenty-four witnesses, the prosecution rested. Ocasio and Manrich each moved for judgments of acquittal. With respect to the Count One extortion conspiracy, Ocasio pursued his *Brock* argument that Count One rested on a legally impermissible theory under which he could not be convicted. The district court denied Ocasio's acquittal motion, as well as Manrich's, distinguishing *Brock* and concluding that this Court's

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[9] Ocasio's proposed instruction concerning his *Brock* argument stated:

> In order to convict a defendant of conspiracy to commit extortion under color of official right, the government must prove beyond a reasonable doubt that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy. Therefore, if you find that the only person or persons from whom a defendant conspired to obtain money by extortion under color of official right was another person or other persons who were also members of the conspiracy, then you must find the defendant not guilty of the conspiracy.

J.A. 136.

decision in *United States v. Spitler*, 800 F.2d 1267 (4th Cir. 1986), controlled.

The following day, Manrich pleaded guilty to the charges lodged against him in the superseding indictment. Ocasio, however, proceeded with the trial and called five witnesses in his defense, three of whom were character witnesses. Ocasio himself did not testify. At the conclusion of the evidentiary presentations, Ocasio renewed his judgment of acquittal motion, which was again denied.

On February 24, 2012, prior to deliberations, the district court instructed the jury, including in those instructions the essential elements of the Hobbs Act conspiracy and extortion offenses lodged against Ocasio. The court did not instruct the jury on Ocasio's *Brock* argument. That afternoon, the jury found Ocasio guilty of all charges against him, that is, conspiring to commit Hobbs Act extortion, plus three counts of Hobbs Act extortion.

On June 1, 2012, the district court sentenced Ocasio to eighteen months in prison, to be followed by three years of supervised release. The court also ordered Ocasio to make restitution to the BPD in the sum of $1,500.00, the aggregate value of the cash payments Ocasio had received from the Majestic Repair Shop. The prosecution sought further restitution with respect to Erie Insurance, predicated on the proposition that Ocasio had defrauded GEICO, which in turn had been reimbursed by Erie (as insurer for the at-fault driver involved in the accident with Ocasio's wife). At sentencing, the court deferred ruling on the Erie restitution issue and took the matter under advisement. The criminal judgment,

without addressing the prosecution's restitution request with respect to Erie, was entered on June 5, 2012. On July 23, 2012, the court entered an amended judgment, directing Ocasio to make restitution to Erie in the sum of $1,870.58. That amount represented the difference between the total reimbursement made by Erie and the amount actually attributable to the Erie-insured motorist.

Ocasio timely noticed this appeal, and we possess jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

II.

On appeal, Ocasio maintains that the Count One conspiracy conviction is fatally flawed. Under Ocasio's theory, conspiring to extort property from one's own coconspirator does not contravene federal law, and thus the conspiracy offense was not proven and the district court erred in denying him an acquittal on Count One. Additionally, Ocasio challenges the restitution award to Erie Insurance, contending that Erie is not a victim of any of his offenses of conviction.

A.

We first address and reject Ocasio's contention that his Count One conspiracy conviction is legally invalid.[10] We review de novo a district court's denial

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[10] Ocasio further posits that the fatally flawed Count One conspiracy charge enabled a prejudicial trial joinder with his alleged coconspirator Manrich, and, as a result, he is also entitled to a new trial on the three substantive Hobbs Act charges (Counts Five through Seven). Because we reject the

of a motion for judgment of acquittal. *See United States v. Smith*, 451 F.3d 209, 216 (4th Cir. 2006). In conducting such a review, we must sustain a guilty verdict if, viewing the evidence in the light most favorable to the prosecution, it is supported by substantial evidence. *See id.* Moreover, we review de novo a question of law, including an issue of statutory interpretation. *See United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010).

1.

Ocasio was convicted under 18 U.S.C. § 371 of conspiring with BPD officers, as well as Moreno, Mejia, and others known and unknown to the grand jury, to contravene the Hobbs Act by extorting three victims — Moreno, Mejia, and the Majestic Repair Shop. Section 371, the general federal conspiracy statute, provides that such an offense occurs when

> two or more persons conspire to commit any offense against the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy.

Consistent with the statutory language, the trial court instructed that, in order to convict Ocasio of the Count One conspiracy, the jury was obliged to find that the prosecution satisfied the following elements:

> First, that two or more persons entered the unlawful agreement that is charged in the [superseding] indictment, starting in or

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premise that Ocasio's Count One conspiracy conviction is legally invalid, we must also deny his new trial request.

> about the spring of 2008, and this is the agreement to commit extortion under color of official right[;]
>
> Second, that the defendant, Mr. Ocasio, knowingly and willfully became a member of that conspiracy[;]
>
> Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the [superseding] indictment; and
>
> [F]ourth, that the overt act, which you find to have been committed, was done to further some objective of the conspiracy.

J.A. 1176–77. The court explained that "the reasonably foreseeable acts, declarations, statements and omissions of any member of [a] conspiracy, in furtherance of the common purpose of the conspiracy, are considered under the law to be the acts of all the members, and all the members are responsible for such acts." *Id.* at 1186. The court further explained that, if the jury found Ocasio a member of the charged conspiracy "then any acts or statements in furtherance of the conspiracy by [persons] you also find to have been members of the conspiracy, may be considered against" Ocasio, "even if those acts were done, and the statements were made, in his absence and without his knowledge." *Id.*[11]

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[11] Of note, the district court made clear that the jury was to consider whether the prosecution had satisfied its burden of proof as to any and all of the overt acts charged in the superseding indictment, including those committed by Manrich. The court explained that, if the jury were to find that both

The statutory object of the Count One conspiracy was to violate the Hobbs Act, which provides, in pertinent part, that

> [w]hoever in any way or degree obstructs, delays, or affects commerce by extortion in furtherance of a plan or purpose to do anything in violation of this section shall be [guilty of an offense against the United States].

18 U.S.C. § 1951(a). The Hobbs Act defines "extortion," in pertinent part, as "the obtaining of property from another, with his consent, under color of official right." *Id.* § 1951(b)(2). In order to prove such a Hobbs Act extortion offense, the prosecution "need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans v. United States*, 504 U.S. 255, 268 (1992).

2.

Ocasio, relying on the Sixth Circuit's decision in *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007), contends that his conspiracy conviction is fatally flawed because a public official cannot be convicted of conspiring to extort property from his own coconspirator. He seeks to distinguish our decision in

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Manrich and Ocasio were members of the conspiracy, then the jury could consider any acts done or statements made by Manrich "during the course of the conspiracy, and in furtherance of the conspiracy," in its "decision as to whether the government has proved all of the elements of the offenses charged against Mr. Ocasio." J.A. 1187-88.

United States v. Spitler, 800 F.2d 1267 (4th Cir. 1985) — the decision primarily relied upon by the district court to reject Ocasio's theory.

a.

We begin our analysis by discussing *Brock* and *Spitler*.[12] In the latter case, we ruled that *Spitler*, an employee of a state contractor, was properly convicted under the Hobbs Act for conspiring with a state highway official to extort money and property from Spitler's employer. *See* 800 F.2d at 1278–79. Spitler authorized his underlings to accede to the public official's demands for firearms, jewelry, and other items of value in exchange for approval of inflated invoices. Spitler posited on appeal that "as a victim of [the public official's] extortion he could not, as a matter of law, be convicted as an aider and abettor or a conspirator to the extortion merely by virtue of his acquiescence." *Id.* at 1275. We determined, however, that Spitler was no "mere extortion victim." *Id.*

In so ruling, *Spitler* recognized the extremes of a spectrum of conduct ranging from "mere acquiescence" (which is not punishable under conspiracy principles) to active solicitation and

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[12] In *Brock* and *Spitler*, the defendants were not prosecuted under 18 U.S.C. § 371, the statute specified in Count One, but under the conspiracy provision of the Hobbs Act, 18 U.S.C. § 1951. Although the elements of those offenses are similar, a § 371 conspiracy requires proof of an overt act, while a § 1951 conspiracy does not. The maximum penalties under the two statutes also differ: A conspiracy conviction under § 1951 carries a maximum of twenty years, four times that of a conspiracy conviction under § 371.

inducement (which plainly fall within the purview of the conspiracy statutes). *See* 800 F.2d at 1276–78. Writing for the panel, Judge Russell found it unnecessary to "paint with a broad brush and declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator." *Id.* at 1278. That was because the panel concluded that Spitler's involvement in the extortion scheme "constituted a far more active role" than the mere payment of money, in that Spitler had also "induced, procured, caused, and aided" the public official's ongoing extortion. *Id.* (internal quotation marks omitted).

Thereafter, in its contrary *Brock* decision, the Sixth Circuit ruled that the Hobbs Act's conspiracy provision did not reach conduct by private citizens who had concocted a bribery scheme to pay off a county clerk. Brock and his brother operated a bail bond business. When a client "skipped town" and the Brocks became liable on the bond, Brock asked the county clerk to "make the problem go away by removing the scheduled forfeiture hearing from the court's calendar." *See* 501 F.3d at 765 (internal quotation marks and punctuation omitted). Brock then paid the clerk for altering the court's schedule. Brock and his brother conducted the scheme with the county clerk over several years, securing the clerk's cooperation when their bonding clients absconded. The court of appeals determined that, because the Brocks were victims of the clerk's extortion scheme, they could not also be conspirators.

In so ruling, the *Brock* court focused on the language of the Hobbs Act, reasoning that a Hobbs Act conspiracy requires an agreement to obtain "'property from *another*, which is to say, an agreement to obtain property from someone outside the conspiracy.'" 501 F.3d at 767. Additionally, the court noted that the Hobbs Act "requires the conspirators to obtain that property with the other's *consent*," and questioned how or why extortion victims would "conspire to obtain their own consent." *Id.* As the court summarized, "the law says that the conspiracy must extort 'property from another' and do so 'with his consent,' neither of which applies naturally to the conspirators' own property or to their own consent." *Id.* at 768. Notably, the *Brock* court acknowledged *Spitler* but emphasized that it "did not consider the textual anomalies raised here." *Id.* at 769.

b.

As the district court determined, Ocasio's case is governed by our *Spitler* precedent. The *Spitler* rule is that a person like Moreno or Mejia, who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme, can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement. That rule comports with basic conspiracy principles: One who knowingly participates in a conspiracy to violate federal law can be held accountable for not only his actions, but also the actions of his coconspirators. *See, e.g.*, *United States v. Burgos*, 94 F.3d 849, 858 (4th Cir. 1996) (en banc). Put simply, as Judge Haynsworth aptly explained nearly thirty

years ago, a conviction for "conspiring to obstruct commerce in violation of the Hobbs Act may be founded upon proof of an agreement to engage in conduct which would violate the statute." *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir. 1985).

Ocasio contends to the contrary. Relying on *Brock*, he argues that the Hobbs Act's "from another" language requires that a coconspirator obtain property "from someone outside the conspiracy." 501 F.3d at 767. At the outset, we note that the language of the Hobbs Act does not compel this conclusion: the "from another" requirement refers to a person or entity other than the public official. That is, it provides only that a public official cannot extort himself. Thus, where a defendant is charged with conspiring to commit Hobbs Act extortion, the prosecution must show that the object of the conspiracy was for the conspiring public official to extort property from someone other than himself. Nothing in the Hobbs Act forecloses the possibility that the "another" can also be a coconspirator of the public official.

Ocasio next contends that the law must require that a victim under the Hobbs Act be a person outside the conspiracy because, otherwise, every victim's "consent" could be considered his agreement to enter into a conspiracy with his victimizer, "thereby creating a separately punishable conspiracy in every § 1951(a) case." *See* Br. of Appellant 28. Ocasio's premise, however, is foreclosed by *Spitler*, which underscored the proposition that mere acquiescence in an extortion scheme is not conspiratorial conduct. Rather, "conduct more active

than mere acquiescence" is necessary before a person "may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy." *Spitler*, 800 F.2d at 1276. Under *Spitler*, therefore, Ocasio is wrong to suggest that every extortion scheme will necessarily involve a conspiracy to commit extortion. A bribe-payor's mere acquiescence to the scheme suffices to render a bribe-taker guilty of extortion. But *Spitler* requires the bribe-payor's more active participation in the scheme to make him a coconspirator.[13]

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[13] The *Brock* court attempted to distinguish *Spitler* on the ground that the conspirators in *Spitler*, unlike those in Brock, did in fact obtain property from "'another' unrelated entity outside the conspiracy." *See Brock*, 501 F.3d at 769. Under this theory, Spitler's employer — and not Spitler himself — was the victim of the public official and Spitler's extortion scheme. The *Brock* court distinguished the case before it by describing the alleged conspiracy as one whose "supposed point . . . was to extort the Brocks' cash payments, not property from an unrelated entity outside the conspiracy." *Id.*

In *Spitler*, however, we criticized the government for arguing that Spitler could be convicted as a conspirator because it was his employer who was the extortion victim. Specifically, we "question[ed] the soundness of the government's position because under its theory, a corporate officer who merely accedes to a public official's implicit or explicit demands to the corporation by authorizing an expenditure of corporate funds would be subject to prosecution under the Hobbs Act for aiding and abetting the extortion and for conspiracy to commit the extortion." *Spitler*, 800 F.2d at 1275. The propriety of Spitler's conspiracy conviction, Judge Russell explained, rested not on whether some other victim could be identified, but on whether Spitler was a mere victim of — rather than an active participant in — the extortion scheme.

In light of our precedent, we must affirm Ocasio's Count One conspiracy conviction. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent." (internal quotation marks omitted)). We thus decline Ocasio's invitation to afford him relief under the rule of lenity. *See Chapman v. United States*, 500 U.S. 453, 463 (1991) ("The rule of lenity is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute." (internal quotation marks omitted)). We also refuse, as we must, to abandon our *Spitler* precedent and adopt the Sixth Circuit's analysis in *Brock*. *See McMellon v. United States*, 387 F.3d 329, 332 (4th Cir. 2004) (en banc) (recognizing "the basic principle that one panel cannot overrule a decision issued by another panel").[14]

B.

Although we affirm Ocasio's convictions, we vacate the sentencing court's award of restitution to Erie Insurance. Ocasio maintains that Erie was not a

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[14] We further observe that Ocasio's *Brock* theory is factually flawed, in that it relies on an evidentiary premise — that his only coconspirators were Moreno and Mejia — that is entirely at odds with the record. To the contrary, the evidence established a wide-ranging conspiracy involving dozens of BPD officers who received money for referring wrecked vehicles to the Majestic Repair Shop. Under the evidence, the jury was entitled to find each of those BPD officers to be Ocasio's coconspirator, regardless of whether Ocasio even knew him. *See Burgos*, 94 F.3d at 858.

victim of any of his offenses of conviction. At best, he contends, Erie was the victim of an uncharged insurance fraud scheme. Our review of the court's restitution order is for abuse of discretion. *See United States v. Llamas*, 599 F.3d 381, 387 (4th Cir. 2010). We assess de novo any legal questions raised with respect to restitution issues, including matters of statutory interpretation. *See United States v. Ryan-Webster*, 353 F.3d 353, 359 (4th Cir. 2003).

The Victim Witness Protection Act (the "VWPA") provides in pertinent part that a district court, when sentencing a defendant convicted under Title 18, may order him to make restitution to any victim of the offenses of conviction. *See* 18 U.S.C. § 3663. The VWPA defines a "victim" as

> a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

Id. § 3663(a)(2). The Supreme Court has explained that a restitution award must "be tied to the loss caused by the offense of conviction" and does not "permit a victim to recover for losses stemming from all conduct attributable to the defendant." *Hughey v. United States*, 495 U.S. 411, 418 (1990). Consistent therewith, we have recognized that the VWPA "authorizes restitution only for losses traceable to the offense of conviction." *United States v. Ubakanma*,

215 F.3d 421, 428 (4th Cir. 2000). In conspiracy prosecutions, however, "broader restitution orders encompassing losses that result from a criminal scheme or conspiracy, regardless of whether the defendant is convicted for each criminal act within that scheme," are permitted. *United States v. Henoud*, 81 F.3d 484, 488 (4th Cir. 1996). Nevertheless, an award of restitution is only appropriate if the act that harms the purported victim is "either conduct underlying an element of the offense of conviction, or an act taken in furtherance of a scheme, conspiracy, or pattern of criminal activity that is specifically included as an element of the offense of conviction." *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996). Accordingly, we explained that when

> the harm to the person [or entity] does not result from conduct underlying an element of the offense of conviction, or conduct that is part of a pattern of criminal activity that is an element of the offense of conviction, the district court may not order the defendant to pay restitution to that individual.

Id.

Applying the foregoing standard to these circumstances, we are unable to endorse the sentencing court's determination that Erie Insurance suffered any losses that resulted from the Hobbs Act extortion conspiracy charged in Count One. Indeed, nothing in the superseding indictment or in the trial evidence suggests that an object of that conspiracy was to commit insurance fraud. Nor does the record suggest that an insurance fraud scheme was part of a

pattern of criminal activity included as an element of the Count One conspiracy. Perhaps Ocasio could also have been convicted of defrauding Erie Insurance or conspiring to do so, but that did not occur. The United States Attorney and the grand jury did not see fit to charge Ocasio with an insurance fraud scheme, and it would thus be inappropriate to penalize him as though he was also convicted of that offense. Because Erie was not a "victim" under the VWPA, the district court's award of restitution to Erie Insurance must be vacated.[15]

III.

Pursuant to the foregoing, Ocasio's convictions and sentence, as reflected in the district court's judgment order of June 6, 2012, are affirmed. The court's amended judgment order of July 23, 2012, however, is vacated to the extent that it includes the award of restitution to Erie Insurance. We remand for such other and further proceedings as may be appropriate.

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[15] The information under which Moreno and Mejia were separately prosecuted and convicted alleged, in pertinent part, that (1) "Moreno and Mejia agreed with various BPD Officers to add damage to vehicles in order to increase Majestic's profit from the insurance company payments," and (2) "various BPD Officers would falsify [accident reports]" to make it appear that the damage added to the vehicle by Majestic had actually been caused by the underlying accident, thus enabling Majestic to seek additional reimbursements from various insurance companies. *See United States v. Moreno*, No. 1:11-cr-357, Information at 5 (D. Md. June 29, 2011), ECF No. 1. Notably, however, neither the initial nor the superseding indictments charging Ocasio include any allegation that he or any other conspirator falsified accident reports or insurance claims.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

SAMUEL OCASIO, et al. — CRIMINAL NO. CCB-11-0122

DEFENDANTS

JURY TRIAL EXCERPTS

February 23, 2012

Before: The Honorable Catherine C. Blake
United States District Judge

ORAL RULING DENYING DEFENDANT'S
PROPOSED JURY INSTRUCTIONS

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[89]

MR. CROWE: The defense, as you know, requested the reasonable doubt instruction, the standard instruction from Sand. I'm aware of the Fourth Circuit law, but nonetheless, we object to that instruction not being given.

Secondly, with respect to the conspiracy, we had asked that under the *Brock* case, the Court instruct the jury that it must, in order to convict Mr. Ocasio of the conspiracy, it must determine that the effort was to obtain payment of money, property or services from somebody who was not part of the conspiracy.

That's because of the requirement that the property be obtained from another.

Thirdly, we believe that the *Brock* case also supports, and that the Court should have given an instruction that with respect to the substantive counts, five through seven, that the property also needed to have been obtained from another. That is somebody who was not a party to the agreement. I would particularly note that with respect to the substantive counts, that the indictment charges simply that the money was obtained from Mr. Moreno, and neither Majestic, nor for that matter, Mr. Mejia was mentioned.

THE COURT: All right. Thank you.

I have rejected the *Brock* instruction for reasons briefly explained, and which the government has also outlined from its point of view in a memorandum.

On the beyond a reasonable doubt instruction, it is my understanding, and I don't believe you disagree, Mr. Crowe, that at present, the state of the Fourth Circuit law is that it is not appropriate to attempt to define beyond a reasonable doubt, at least not unless and until the jury requests an instruction, and in that case, it may or may not be determined to be proper, but not as an initial matter.

So those will remain the instructions. There were a few sort of typographical things that I noticed in the course of giving them that I will change, and I will add the paragraph that we discussed about Mr. Manrich.

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Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

SAMUEL OCASIO, et al. — CRIMINAL NO.
DEFENDANTS — CCB-11-0122

SENTENCING HEARING EXCERPTS

June 1, 2012

Before: The Honorable Catherine C. Blake
United States District Judge

ORAL RULING IN REGARDS TO RESTITUTION

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[17]

MS. KELLY: Your Honor, I think the theory that is advanced in these line of cases is that which the Government believes is the accurate one, that this is a betrayal of trust, and that there is a loss to the police department when Mr. Ocasio, instead of patrolling and working and doing the things he's supposed to do as a police officer, is instead waiting at accident scenes for tow trucks to arrive longer than he should, or making calls to Officer Rodriguez to tell him how to get Alex to get there, and that there is a loss to the City for Mr. Ocasio's services

that he should be providing to the City while he is instead engaged in what he was doing.

For instance, the night of Victor Reillo's car, I mean, hours of his shift were spent coordinating Mr. Moreno getting to the Southeast District to pick up Victor Reillo's car instead of doing whatever else Mr. Ocasio is supposed to be doing when he's working. I think there was testimony that, the night that Mr. Ocasio went to the scene for Quintanilla's car, that the other officer who testified, Horace — I can't remember his last — McGriff. Officer McGriff testified that he was pretty much ready to go, and Mr. Ocasio is hanging around.

I think that there is just absolutely a loss to the Baltimore Police Department when Mr. Ocasio is calling Alex Moreno instead of doing his job, and I don't think that $1,500 to the Baltimore Police Department is an outrageous amount or some unreasonable amount for Mr. Ocasio to repay.

In response to Mr. Crowe's sentencing memorandum, he had advanced the argument that Mr. Ocasio should not have to repay the $300 that Alex Moreno paid him for bringing his own car, and the $300 that he had paid for bringing Victor Reillo's car, and, again, I think the Government's taken a real restrictive view of this. I think there is an argument to be made that Alex Moreno is making those payments to him so that Mr. Ocasio will keep sending him cars, and that $600, while it might not be in exchange for his official duty, it's almost like lulling. It's almost like encouragement to stay part of my scheme. I think that $600 could absolutely be

included in both the loss amount and the restitution amount.

I think the Government has taken a fair, restrictive view of the five incidents that were proven or evidence was put on at trial, three of which were substantive counts of the Indictment, and I think it would be fair to say that the Baltimore Police Department, in dealing with what Mr. Ocasio did, has lost $1,500. How about the pay of Detective Matthew Smith who sat at this trial for two weeks and in investigating this case? I mean, the entire IAD has been part of this, you know, massive investigation, the massive conspiracy in which Mr. Ocasio was a part of, and to suggest the Baltimore Police Department didn't lose some value is unfair, and, when it's fairly impossible to come up with an exact value, the amount of the gain is an acceptable way to value it, and the Government believes that that's a fair way to look at it.

THE COURT: Mr. Crowe?

MR. CROWE: Ms. Kelly has made a number of points, and I hope my recollection both as to what she said and what happened at the trial is correct. My recollection is that, with respect to Mr. Quintanilla, he was the gentleman whose car was damaged and was in the backyard of his residence, that my client was called because they needed a Spanish-speaking interpreter. In fact, Mr. Quintanilla had an interpreter when he testified in court.

With respect to the $300 on Mr. Ocasio's car, that is not a matter that the Government has said that they thought should be taken into account until

Ms. Kelly did so just a minute ago. We certainly did say that the payment for Reillo was not something which should be considered restitution, because it was not money that he gave for referring Mr. Reillo under color of official right. It was a referral as a friend, and I think it would be sort of silly to say that Reillo did it for that reason, and Mr. Reillo, of course, was a Government witness.

With respect to the statement that, you know, Detective Matthew Smith has been here in court and has caused the Baltimore Police Department quite a bit of money, I don't doubt that an awful lot of money has gone into the investigation in this case, but I think the evidence — I mean, I think that the loss, quite clearly that's not a proper measure of restitution, that restitution is just simply the loss, not what you had to do to investigate the claim or to prosecute it. Otherwise, you know, restitution would be the tail that wagged the dog in a lot of criminal cases.

THE COURT: Okay. Well, on the restitution question, which is a little bit distinct from the amount of loss question under the guidelines as I read the various cases that were cited both by the Government and Mr. Crowe, I find sufficient support to award to the Baltimore Police Department the amount of $1,500 that results from the five admitted payments of $300 each to Mr. Ocasio for referring civilians — not a friend, not himself — to Majestic in contravention of his duties to the Baltimore Police Department.

I think that this order of restitution would properly be entered under 18 U.S.C. § 3663, the

Victim-Witness Protection Act, I believe it's called, as a matter of the Court's discretion, rather than the mandatory act. I do believe that the actions that Mr. Ocasio took were a betrayal of trust and not what he should have been doing to fulfill his duties to the Baltimore City Police Department. If one were to even attempt to calculate it, I would certainly agree with the Government that there is at least that amount of value of time that Mr. Ocasio should have been spending on his correct and legitimate duties owed to the City rather than on participating in this scheme for his personal gain.

So I think, either looked at in a purely monetary loss to the City from the time monetary value to his services, or on the principle that he should be required to disgorge what he got by wrongfully using his public position to that public employer, as I say, under either or both — a combination of theories, I think an order of restitution to the Baltimore Police Department for the sum of $1,500 is correct.

Forfeiture, I'm not sure that I see the basis for or that we need to try to press in this case.

MS. KELLY: Usually there would be a money judgment — a forfeiture order for a money judgment for the $1,500, but, in such a low amount, I don't think it's necessary in this case.

MR. CROWE: If there is no issue, there is no issue.

MS. KELLY: Yeah.

MR. CROWE: That's fine.

THE COURT: Okay. I believe, for an award under the Victim-Witness Protection Act, 18 U.S.C. § 3663, I'm also required to make some findings about Mr. Ocasio's ability to repay that. I don't know if that's really a dispute. I think he clearly has the ability at some point down the road to earn enough money to gradually, on a reasonable payment schedule, pay back that $1,500, but —

MR. CROWE: We agree, Your Honor, and will not contest that.

* * * *

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

SAMUEL OCASIO, et al. — CRIMINAL NO.
DEFENDANTS — CCB-11-0122

JURY TRIAL EXCERPTS

Feb. 22, 2012

Before: The Honorable Catherine C. Blake
United States District Judge

ORAL RULING DENYING
MOTION FOR JUDGMENT OF ACQUITTAL

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[170]

THE COURT: Defense have any motions?

MR. MARR: Your Honor, the Court please, on behalf of the defendant, Kelvin Manrich, I move for a judgment of acquittal, and I place that on the record. I have no further argument.

THE COURT: All right. Thank you. Mr. Crowe.

MR. CROWE: Your Honor, on behalf of my client, I also make a motion for judgment of acquittal, both on the conspiracy count and all of the substantive counts. I think even taking all inferences

in favor of the government, the government still has not made out a prima facie case.

With respect to the conspiracy count, in particular, we have raised the issue in the *Brock* case.

The *Brock* case has that certainly a conspiracy to commit a 1951(a) violation has to be something indicating that money came from another.

The indictment in this case charges that the proceeds from the conspiracy were extracted from three people. That is Moreno, Mejia, and Majestic.

I think the fact that the indictment has the two individuals, as well as the company, which was solely a creature, is enough to distinguish it from other cases which do not agree with *Brock*.

I'm sure the Court has also read the Fourth Circuit's opinion in Medford, which kind of ducks the issue, because the indictment did not say that the source of the money was part of the conspiracy. It had not been raised below. Therefore, based on plain error —

THE COURT: I'm sorry. I'm having a little trouble hearing you.

MR. CROWE: Based on the plain error analysis, that it wasn't going to look any further in the question. So there's clearly no Fourth Circuit law on that.

Although the argument is a little more strained as to a substantive count, we believe that for a 1951(a) conviction, it also has to be money which was

extracted from somebody, you know, from somebody else who is not part of the conspiracy.

In that context, I would point out that the indictment is a little bit peculiar, in that it charges, my recollection is that in all the substantive counts, it charges that the money was extorted from Moreno, not from Moreno or Mejia or Majestic, but simply from Moreno. Mr. Moreno was clearly part of the conspiracy.

THE CLERK: Excuse me.

(Pause.)

THE COURT: All right. You may continue.

MR. CROWE: One final point is that Count 7 I believe is the count which deals with the car that involved Latitia Neal. I don't see any interstate commerce there. The car was simply towed to Majestic. The car was deemed total. There was nothing done with the car other than to give it back.

You almost have to go to a case like *Wickard versus Filburn* to find there is so little interstate commerce. Thank you, Your Honor.

THE COURT: All right. Thank you. Would the government like to respond?

MS. GAVIN: Yes, Your Honor. The government would refer obviously the Court to the argument made in the motion in limine at the beginning of this case with respect to the *Brock* decision and why that case has not been followed in this circuit, or I believe anywhere else, and that it is simply not applicable in this district to this case.

I would also point out that with respect to the substantive counts, the defendants are each charged also with aiding and abetting, which I think also certainly, under the *Evans* case, makes it very clear that an individual can be charged in this way. The payor can also be charged with the substantive count of extortion here under both the direct and aiding and abetting in the substantive counts.

So we would refer the Court to that, as well as the arguments made in the motion in limine.

THE COURT: All right. Thank you.

Well, I do appreciate that the issue was raised in advance in limine, so I have looked at the cases.

I think certainly as to the substantive counts, even if one otherwise agreed with the reasoning in *Brock*, it is hard to extend that to the substantive counts, particularly in light of the Supreme Court's holding in *Evans versus United States*.

The Fourth Circuit did have a chance to rule on this recently, but found it not necessary in the *Medford* case because there were other people or other entities at least not charged in the conspiracy from which money had been taken. So we don't have a recent decision of the Fourth Circuit.

We do have Judge Bennett's opinion in the *Curry* case and a case from the District of Alaska, and an older Fourth Circuit case, that all would appear to reject the argument or the decision in *Brock*.

I think we also do have in this case something very similar to the earlier — I think it's the *Spitler* case — the earlier Fourth Circuit case which was

discussed in *Brock*, and it found distinguishable because in that case, there was a company which was actually the source of the payment. Even though it was a similar situation I think to this, where it was a high level agent or employee of the company that was taking the company money and using it to make the payments, the Sixth Circuit in *Brock*, therefore, found that to distinguish the *Spitler* case. I think that's very similar to what we have here.

Regarding Count 7, the interstate commerce, the effect on interstate commerce, of course, that has to be shown as minimal. I do believe there is sufficient evidence in the case for the jury to find that that fairly low threshold has been met, if they choose to do so.

So at this point, I am denying the motions for judgment on all counts.

* * * *

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

vs.

SAMUEL OCASIO, et al. — CRIMINAL NO. CCB-11-0122

DEFENDANTS

JURY TRIAL EXCERPTS

Feb. 23, 2012

Before: The Honorable Catherine C. Blake
United States District Judge

ORAL RULING DENYING
RENEWED MOTION FOR JUDGMENT OF ACQUITTAL

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[46]

THE COURT: Okay. Then we are at the conclusion of all the evidence in the case.

Mr. Crowe, I assume you are renewing your motion?

MR. CROWE: We renew the motion for judgment of acquittal on the grounds previously stated.

THE COURT: All right. For the same reasons as previously stated, I am denying your motions. I am specifically rejecting the *Brock* argument in the

context of this case. I think there is sufficient evidence as to all the elements of the four offenses to go forward to the jury.

* * * *

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-4462
(1:11-cr-00122-CCB-13)
Filed: May 28, 2014

UNITED STATES OF AMERICA,
Plaintiff Appellee,

v.

SAMUEL OCASIO,
Defendant Appellant.

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

SAMUEL OCASIO — Case Number:
DEFENDANT — CCB-11-0122

JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or
After November 1, 1987)

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* * *

THE DEFENDANT:

* * *

[x] was found guilty on counts One (1s), Five (5s), Six (6s) & Seven (7s) of the Superseding Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:371	Conspiracy	2008–2/2011	1s
18:1951(a) & 2	Extortion Under Color of Official Right; Aiding and Abetting	1/17/2010,	5s
		1/10/2011 & 1/15/2011	6s 7s

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by *U.S. v. Booker*, 125 S. Ct. 738 (2005).

* * *

[x] Original Indictment is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

June 1, 2012
Date of Imposition of Judgment

/s/
Catherine C. Blake
United States District Judge

* * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 months as to Counts 1s, 5s, 6s & 7s to run concurrent to each other.

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a facility consistent with his security level and needs that is as close as possible to Harford

County, Maryland so that he may be close to his family.

* * *

[x] The defendant shall surrender, at his own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal which shall be no earlier than **Monday, July 30, 2012**. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

[x] before 2 p.m. on Monday, August 6, 2012.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to Counts 1s, 5s, 6s & 7s to run concurrent to each other.

* * *

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$400.00	$ Waived	$1500.00

* * *

[x] The determination of restitution as to GEICO is deterred.

[x] The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Clerk, U.S. District Court 101 W. Lombard Street Baltimore, Maryland 21201	$1,500.00	$1,500.00	
*** *Restitution amount subject to change*			
TOTALS	$1,500.00	$1,500.00	

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. [x] In full immediately; or

* * *

[x] on a nominal payment schedule of $100.00 per month during the term of supervision.

* * * *

Appendix H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

SAMUEL OCASIO — Case Number: CCB-11-0122

DEFENDANT

AMENDED JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed on or After November 1, 1987)

---

* * *

Reason for Amendment:

[x] Correction of Sentence on Remand

THE DEFENDANT:

* * *

[x] was found guilty on counts One (1s), Five (5s), Six (6s) & Seven (7s) of the Superseding Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:371	Conspiracy	2008–2/2011	1s
18:1951(a) & 2	Extortion Under Color of Official Right; Aiding and Abetting	1/17/2010,	5s
		1/10/2011 & 1/15/2011	6s 7s

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by *U.S. v. Booker*, 125 S. Ct. 738 (2005).

* * *

[x] Original Indictment is dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

July 1, 2014
Date of Imposition of Judgment

/s/
Catherine C. Blake
United States District Judge

* * *

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 18 months as to Counts 1s, 5s, 6s & 7s to run concurrent to each other.

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant be placed in a facility consistent with his security level and needs that is as close as possible to Harford

County, Maryland so that he may be close to his family.

* * *

[x] The defendant shall surrender, at his own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal which shall be no earlier than **Monday, July 30, 2012**. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

[x] before 2 p.m. on Monday, August 6, 2012.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to Counts 1s, 5s, 6s & 7s to run concurrent to each other.

* * *

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$400.00	$ Waived	$1500.00

* * *

[x] The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Clerk, U.S. District Court 101 W Lombard Street Baltimore, Maryland 21201	$1,500.00	$1,500.00	
TOTALS	$1,500.00	$1,500.00	

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A. [x] In full immediately; or

* * *

[x] on a nominal payment schedule of $100.00 per month during the term of supervision.

* * * *

Supreme Court, U.S.
FILED
DEC 29 2014
OFFICE OF THE CLERK

No. 14-361

In the Supreme Court of the United States

SAMUEL OCASIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
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QUESTION PRESENTED

Whether conviction of a public official for conspiracy to obtain "property from another, with his consent * * * under color of official right," in violation of the Hobbs Act, 18 U.S.C. 1951, requires proof that the defendant formed an agreement to obtain property from someone outside of the conspiracy.

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In the Supreme Court of the United States

No. 14-361

SAMUEL OCASIO, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 750 F.3d 399.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2014. A petition for rehearing was denied on May 28, 2014 (Pet. App. 45). On July 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 25, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiring to interfere with

commerce by extortion under the Hobbs Act, in violation of 18 U.S.C. 371; and three counts of interfering with commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a). Pet. App. 2-4, 46. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at 47-48. The district court also ordered him to pay $3,370.58 in restitution. *Id.* at 15-16, 48-49. The court of appeals affirmed petitioner's convictions, *id.* at 16-25, 28-29, but vacated the restitution order in part and remanded for further proceedings concerning restitution, *id.* at 28-29.

1. At all times relevant to this case, petitioner was an officer of the Baltimore Police Department (BPD). Pet. App. 2; Gov't C.A. Br. 2. From May 2009 to February 2011, petitioner was one of approximately fifty BPD officers engaged in a kickback scheme in which the officers, working at the scene of automobile accidents, persuaded accident victims to use the Majestic Auto Repair Shop in Baltimore for towing and repair services. Pet. App. 2, 5-13; Gov't C.A. Br. 4-14. In exchange, the officers accepted cash payments—of between $150 and $300 per referral—from Majestic owners Hernan Moreno and Edwin Mejia. *Ibid.*

Petitioner learned about the kickback scheme from another BPD officer, most likely Officer Leonel Rodriguez. Pet. App. 7-8 & n.7. Petitioner worked the night shift, and on several occasions he persuaded accident victims to have their damaged vehicles towed to Majestic, often after consulting with Moreno. *Id.* at 7-8; Gov't C.A. Br. 5. Petitioner usually requested payment by the next afternoon. Pet. App. 8. He collected payments in person from Moreno at Moreno's home, an ATM, or a convenience store. *Id.* at 10-12.

The kickback scheme violated BPD policy. Pet. App. 6-7; Gov't C.A. Br. 3-4. Officers were prohibited from "solicit[ing] or accept[ing] any compensation, reward, gift, or other consideration without the permission of the Police Commissioner." Pet. App. 6 (internal quotation marks omitted); Gov't C.A. Br. 3. For cars that needed towing, investigating officers were required to contact, through dispatch, preapproved towing companies that already had a contract with the City of Baltimore. Pet. App. 6-7 & n.5; Gov't C.A. Br. 4. Majestic was not such a company. Pet. App. 7; Gov't C.A. Br. 4.

2. A grand jury in the District of Maryland indicted petitioner and ten co-defendants—eight other BPD officers, Moreno, and Mejia—in connection with the kickback scheme. Pet. App. 2. All of the BPD officer defendants pleaded guilty except for petitioner and Officer Kelvin Manrich. *Id.* at 3 & n.2. Moreno and Mejia also pleaded guilty and agreed to testify at petitioner's trial. *Ibid.*

A Superseding Indictment charged that petitioner had conspired with other BPD officers and with Moreno and Mejia to interfere with commerce by extortion under the Hobbs Act, 18 U.S.C. 1951. C.A. App. 48-59. In pertinent part, the Hobbs Act prescribes criminal punishment for "[w]hoever in any way or degree obstructs, delays, or affects commerce * * * by * * * extortion." 18 U.S.C. 1951(a). Section 1951(b)(2) defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The Superseding Indictment charged petitioner with a Hobbs Act conspiracy in violation of 18 U.S.C. 371

(Count One). Pet. App. 2-4; C.A. App. 50. It also charged petitioner with three substantive counts of interfering with commerce by extortion, in violation of 18 U.S.C. 1951(a) (Counts Five, Six, and Seven). Pet. App. 2-4. The substantive counts charged petitioner with discrete extortionate acts occurring on January 10, 15, and 17, 2010. C.A. App. 57-59; Pet. App. 8-12.

Before trial, petitioner sought a jury instruction providing that the government, in order to convict him of conspiracy to violate the Hobbs Act, had to prove "that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy." Pet. App. 13-14 & n.9. Petitioner argued that he could not be guilty of conspiracy if the money was obtained only from Moreno and Mejia. *Id.* at 30-31. The district court denied petitioner's request. *Id.* at 31.

Petitioner and Officer Manrich were tried together. At trial, Moreno, Mejia, and other witnesses testified to the facts described above. Pet. App. 3, 14. At the conclusion of the government's evidence and again at the close of all the evidence, petitioner moved for a judgment of acquittal, arguing that he could not be convicted because "the proceeds from the conspiracy were extracted from" Moreno and Mejia, who were co-conspirators. *Id.* at 39; see *id.* at 14-15, 43. The district court denied the motions, reasoning in part that Majestic, not its owners, "was actually the source of the payment." *Id.* at 42. The court also declined to instruct the jury that the government had to prove "that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy." *Id.* at 14 n.9; see *id.* at 15, 31.

The jury found petitioner guilty on the conspiracy count and on all three substantive counts, and the district court sentenced him to 18 months of imprisonment. Pet. App. 46-47. He was also ordered to pay $3,370.58 in restitution. *Id.* at 48-49.

3. The court of appeals affirmed petitioner's convictions.[1] Pet. App. 1-29.

On appeal, petitioner did not contest that the trial evidence was sufficient to prove that he had committed extortion in violation of the Hobbs Act. He argued that he could not be convicted of conspiracy, however, because, in his view, "conspiring to extort property from one's own coconspirator does not contravene federal law." Pet. App. 16. For that argument, petitioner relied on the Sixth Circuit's decision in *United States* v. *Brock*, 501 F.3d 762 (2007), which held that "[t]o be covered by the [Hobbs Act], the alleged conspirators * * * must have formed an agreement to obtain 'property from *another*,' which is to say, formed an agreement to obtain property from someone outside the conspiracy." *Id.* at 767.

The court of appeals disagreed with petitioner's argument. Relying on its own prior decision in *United States* v. *Spitler*, 800 F.2d 1267 (4th Cir. 1986), the court held "that a person * * * who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme[] can be named and prosecuted as a coconspirator even though he is also a pur-

---

[1] The court of appeals partially vacated the district court's award of restitution and remanded for further proceedings concerning restitution. Pet. App. 25-29. On remand, the district court amended the judgment and ordered total restitution of $1,500 rather than $3,370.58. 1:11-cr-00122 Docket Entry No. 298, at 2-5 (D. Md. July 2, 2014) (Am. Judgment); C.A. App. 1387, 1472.

ported victim of the conspiratorial agreement." Pet. App. 22. "That rule," the court observed, "comports with basic conspiracy principles," inasmuch as "[o]ne who knowingly participates in a conspiracy to violate federal law can be held accountable for not only his actions, but also the actions of his coconspirators." *Ibid.*

The court of appeals also disagreed with petitioner, and with the Sixth Circuit in *Brock*, that "the Hobbs Act's 'from another' language requires that a coconspirator obtain property 'from someone outside the conspiracy.'" Pet. App. 23 (quoting *Brock*, 501 F.3d at 767). The court reasoned that "from another" simply "refers to a person or entity other than the public official." *Ibid.* In the court's view, the language of the Hobbs Act does not "foreclose[] the possibility that the 'another' can also be a coconspirator of the public official," provided that the co-conspirator "actively participates" in the conspiracy "rather than merely acquiesc[ing]" in it. *Id.* at 22-23.

Finally, the court of appeals pointed out that *Brock* was also "factually" distinguishable from petitioner's case, because Moreno and Mejia were not petitioner's only co-conspirators. Pet. App. 25 n.14. Rather, petitioner also conspired with "dozens of BPD officers" to interfere with commerce by obtaining property from another—namely, from Moreno, Mejia, and Majestic. *Ibid.*

ARGUMENT

Petitioner contends that, to prove a Hobbs Act conspiracy, the government must show that the defendant agreed to obtain property from someone outside of the conspiracy. He asks the Court to grant review to resolve a disagreement on that issue between the

Fourth and Sixth Circuits. Petitioner's claim lacks merit, and the claim of a conflict does not warrant review. The disagreement is shallow and of comparatively recent origin, and its boundaries are not fully defined. It is also doubtful that, on the facts of petitioner's case, the Sixth Circuit would have reached a different result than the Fourth Circuit did.

1. The decision below is correct. The Hobbs Act prescribes punishment for "[w]hoever" interferes with commerce by the "obtaining of property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2). The statute does not state that the defendant must agree to obtain property from someone outside of the conspiracy. See Pet. App. 23. Nor do its terms imply such a limitation. "Whoever" refers to the defendant official (or a person punishable as a principal under 18 U.S.C. 2). Property from "another" refers to property not belonging to that official. See *Merriam-Webster's Collegiate Dictionary* 48 (10th ed. 1993) (defining "another" to mean, *inter alia*, "different or distinct from the one first considered"). And the phrase "with his consent" refers to the consent of someone other than the public official. To convict a public official of conspiracy to commit Hobbs Act extortion, in violation of 18 U.S.C. 371, therefore, the government must prove (a) that the defendant formed an agreement intended to obtain property from another with the other's consent, and (b) that one of the co-conspirators performed "any act to effect the object of the conspiracy." *Ibid.* Petitioner satisfied both parts of that test by agreeing to receive and by receiving bribes from

Moreno, even apart from his agreement with other BPD officers.[2]

Petitioner's reading also produces textual anomalies. Petitioner does not contest in this Court that he committed substantive Hobbs Act violations by accepting payments from Moreno. Pet. App. 46; C.A. App. 57-59. But if a bribe-payer such as Moreno can be "another" under Section 1951(b)(2) for purposes of a substantive Hobbs Act violation, it is difficult to see how that same person can lose his status as "another" solely by virtue of a conspiracy charge under 18 U.S.C. 371. Nor is it clear why Moreno's consent should suffice to prove the substantive offense but not a conspiracy charge based on that offense. Section 1951(a) itself proscribes not just interfering with commerce by extortion but also "conspir[ing] so to do," which suggests that "property from another" and "with his consent" mean the same thing both in substantive and in conspiracy cases.

Finally, the rule petitioner proposes would produce arbitrary and incongruous results. If petitioner had been charged of conspiring *solely* with his fellow BPD officers, then petitioner could not contest that both elements—"property from another" and "with his consent"—would be satisfied. Yet petitioner argues that a broader conspiracy charge that *also* includes Moreno as a willing participant is beyond the statute's reach. The statute's text should not be read to produce such bizarre results.

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[2] Petitioner errs by looking at the extortion offense from the perspective of all the conspirators, rather than the defendant. See Pet. 14 ("[T]heir agreement does not concern 'another' at all—only themselves."); *ibid.* ("[I]n no sense have they 'conspired' to obtain anyone's 'consent.'").

Petitioner's suggestion (Pet. 12, 16) that the Fourth Circuit's standard is vague because it draws a line between "mere acquiescence" and "active participation" by a bribe-payer is unfounded. The court of appeals made clear (Pet. App. 22-24) that this inquiry determines whether a defendant is simply complying with an official demand—or is instead becoming a conspirator by knowingly participating in the criminal agreement. That is not a vague distinction, but is essential to the formation of a conspiracy. See *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) ("The essence of conspiracy is 'the combination of minds in an unlawful purpose.'" (quoting *United States* v. *Hirsch*, 100 U.S. 33, 34 (1879)). The possibility that "close cases can be envisioned" does not "render[the] statute vague." *United States* v. *Williams*, 553 U.S. 285, 305 (2008). "Close cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *Id.* at 306.

2. Petitioner is correct that the Fourth and Sixth Circuits disagree about whether, in at least some Hobbs Act conspiracy cases, the government must prove that the defendant agreed to obtain property from someone outside of the conspiracy. But given that the conflict is limited to two circuits and remains unclear in its scope, this Court's intervention is not warranted. In any event, the disagreement is not direct, because the Sixth Circuit did not confront a case like this one in which the defendant was a public official who received a bribe, rather than the bribe-payer. And this case would be a particularly poor vehicle for resolving any conflict because the record

supports the conclusion that petitioner conspired with his fellow BPD officers, not solely with Moreno.

a. In *United States* v. *Brock*, 501 F.3d 762 (6th Cir. 2007), the defendants were convicted of conspiracy to commit extortion based on evidence that they bribed a supervisory clerk at the county courthouse to delete bond forfeiture hearings from the court's calendar. *Id.* at 765. Because the defendants had used their own money to pay the bribes, it was undisputed that "the [defendants] did not commit a substantive act of extortion" because "[t]hey did not 'obtain property from another' person." *Id.* at 767 (some brackets omitted) (quoting 18 U.S.C. 1951(b)(2)). The question was whether, as "the payor[s] of a bribe to a state official," they could nevertheless be found guilty of "conspir[ing] with that official to extort property" from themselves. *Id.* at 764.

The Sixth Circuit held that they could not. First, the court stated that the defendants and the county clerk "did not agree, and could not have agreed, to obtain property from 'another' when no other person was involved." 501 F.3d at 767. Second, the court stated that the property could not have been obtained "with the other's *consent*," because "[h]ow do (or why would) people conspire to obtain their own consent?" *Ibid.* Third, the court noted that the Hobbs Act is meant to punish "public officials who *accept* a bribe when there is a quid pro quo for the payment," not "private individuals who *offer* a bribe to public officials." *Id.* at 768. Thus, "[h]aving opted not to punish the giving of bribes directly, Congress should not be treated as having prohibited them through the sleight of indictment of an extortion conspiracy." *Ibid.* Finally, the court concluded that the rule of lenity and

principles of federalism favored a narrower interpretation of the statute. *Id.* at 768-769.

As the court below recognized, its decision is inconsistent with *Brock*'s statement that the Hobbs Act "requires that a coconspirator obtain property 'from someone outside the conspiracy.'" Pet. App. 23 (quoting 501 F.3d at 767). But *Brock* derived its holding from concerns that are largely inapplicable to this case, because petitioner is a public official who accepted bribes from a private citizen. Petitioner, unlike the defendants in *Brock*, could unquestionably be held liable for the substantive crime of extortion—*i.e.*, he was capable of "obtain[ing] property from another" and also capable of doing so "with the other's *consent*." 501 F.3d at 767; see *id.* at 768 ("[T]he definition of extortion 'under color of official right' correctly extends to public officials who *accept* a bribe."). For the same reason, the Sixth Circuit's concern about "transform[ing] the Act into a prohibition on paying bribes to public officials," *ibid.*, is not implicated here.

Brock did more broadly state that conspiracy liability for a Hobbs Act extortion offense requires "an agreement to obtain property from someone outside the conspiracy." 501 F.3d at 767. But the Sixth Circuit might modify or narrow that rule if confronted with a case such as this, in which the defendant is a public official accused of accepting bribes from others.[3] As petitioner acknowledges (Pet. 17), no other

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[3] The Sixth Circuit has applied *Brock* to a Hobbs Act conspiracy in at least one other case. See *United States* v. *Gray*, 521 F.3d 514, 532-540 (2008), cert. denied, 557 U.S. 919 (2009). That case, like *Brock*—and unlike this case—involved defendants who were accused of paying bribes *to* public officials. See *id.* at 535 ("[P]ay-

court of appeals has directly considered the issue. It would therefore be premature to grant review before the Sixth Circuit has clarified its position on whether a public official may be convicted of conspiring to obtain property from other members of the conspiracy.

b. The facts of this case also make it a poor vehicle for addressing the disagreement that petitioner identifies. As the court below observed, petitioner's argument "is factually flawed, in that it relies on an evidentiary premise—that his only coconspirators were Moreno and Mejia—that is entirely at odds with the record." Pet. App. 25 n.14. In fact, "the evidence established a wide-ranging conspiracy involving dozens of BPD officers." *Ibid.*; see *id.* at 5 ("approximately fifty [BPD] officers").

For instance, the evidence indicates that petitioner learned of the kickback scheme from another BPD officer, most likely Officer Rodriguez. Pet. App. 7-8 & n.7. On January 17, 2010, after petitioner persuaded an accident victim to have his vehicle towed by Majestic, Moreno arrived at the scene of the accident with Officer Rodriguez. "Despite knowing each other, Rodriguez and Ocasio acted as strangers." *Id.* at 8 n.7. This and other evidence "entitled [the jury] to find * * * [other] BPD officers to be Ocasio's coconspirator." *Id.* at 25 n.14.

Petitioner suggests (Pet. 9) that the indictment did not "advance[] that theory," but he is incorrect. The conspiracy count alleged that petitioner "agree[d] * * * with other Baltimore Police Department Officers" to "unlawfully obtain[,] under color of official

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ments were made directly by defendants to public officials to gain favor and to improve their lot as consultants.").

right, money and other property from Moreno, Mejia, and Majestic, with their consent." C.A. App. 50; see *id.* at 51 ("It was a purpose of the conspiracy for Moreno and Mejia to enrich over 50 BPD Officers, including the defendants."); see also *id.* at 53 (incorporating the January 17 incident as an overt act). The fact that the indictment also alleged that Moreno and Mejia were conspirators (Pet. 18-19) does not prevent the indictment from charging a factually lesser-included BPD-only conspiracy. Cf. *United States* v. *Miller*, 471 U.S. 130, 135, 145 (1985) (indictment validly includes a fraudulent scheme that is "much narrower than, though included within, the scheme that the grand jury had alleged," and a defendant may be convicted on such a narrower scheme). And, although the government did not emphasize the point in its closing argument or in its appellate brief, the court of appeals could "affirm on any basis fairly supported by the record." *Doe* v. *Kidd*, 501 F.3d 348, 360 (4th Cir. 2007) (citation and internal quotation marks omitted), cert. denied, 552 U.S. 1243 (2008).

Given the nature of the charge and the factual record that established a broad public-official conspiracy to obtain bribes from Moreno, Mejia, and Majestic under color of official right, the Sixth Circuit could have readily reached the same result, irrespective of its view on the question presented. Accordingly, further review based on petitioner's claim of a conflict is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
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STEPHAN E. OESTREICHER, JR.
Attorney

DECEMBER 2014

No. 14-361

In the
Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER

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January 13, 2015

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REPLY BRIEF

Having prevailed below, the government understandably does not want this Court to grant review. But it offers no meaningful response to the principal reasons why certiorari is warranted. It concedes, as it must, that there is a split in authority over the question presented—whether, in a Hobbs Act conspiracy case, the government must prove that the conspirators agreed to obtain property from someone outside the conspiracy. It makes no serious effort to defend its interpretation of the statute, which relies on the extravagant idea that co-conspirators can conspire to obtain their own consent. It has no answer to the rule of lenity principles addressed in the petition that wholly undermine its position. And it does not deny that this case raises an important, recurring issue about the government's authority to expand the definition of federal crimes.

The government's opposition brief is instead largely focused on manufactured distractions. It claims, for instance, that the split in lower court authority is not "direct" enough because there are factual differences between the lower court cases, and it proposes that perhaps the Sixth Circuit might do something else if confronted with different facts. But the facts highlighted by the government made no difference to the Sixth Circuit's legal holding, which did not turn on particular facts but on its considered judgment of what the Hobbs Act "from another" language requires.

The government also insists that the decision below "is correct," but its arguments only confirm

how extreme and untenable its position is. The government's statutory interpretation depends on the notion that when two or more people conspire to extort property "from another," that includes merely exchanging property between themselves. It requires transforming every payment of a bribe into a conspiracy, even though the Court has never construed the Hobbs Act to criminalize the *paying* of bribes. And it simultaneously sweeps away 18 U.S.C. § 1951(a)'s express distinction between a conspiracy and its substantive offense, rendering every substantive conspiracy a conspiracy to commit extortion.

Finally, the government suggests that this case is not an ideal vehicle to address the question presented because the jury could have found petitioner to be part of a conspiracy that consisted *only* of other Baltimore Police Officers (and not the repair shop owners, Mareno and Mejia, who paid the bribes). But that newly-minted theory cannot be squared with the conspiracy charge set forth in the indictment, much less the way in which the government elected to present its case to the jury and argued it on appeal. Certiorari should be granted.

I. The Courts of Appeals Are Divided On the Question Presented.

The government cannot reasonably dispute that there is an entrenched split in lower court authority that will not be resolved absent this Court's intervention. *See* Pet. 10–13. It acknowledges that the "Fourth and Sixth Circuits disagree" on the question presented. Opp. 9. It does not dispute that the two lower court opinions are comprehensive and

carefully considered. And it cannot deny that the Fourth Circuit expressly rejected the Sixth Circuit's "contrary *Brock* decision" (App. 21), and that the Sixth Circuit expressly declined to follow Fourth Circuit precedent. *United States v. Brock*, 501 F.3d 762, 769–70 (6th Cir. 2007).

The government nonetheless maintains that the conflict is not direct enough because "the Sixth Circuit did not confront a case like this one in which the defendant was a public official who received a bribe, rather than the bribe-payer." Opp. 9. But that factual distinction is irrelevant to the legal question presented. The court below did not distinguish *Brock* on that factual nuance, and the government's interpretation cannot be squared with what the Sixth Circuit actually said. As the decision below recognized, *see* App. 22, the Sixth Circuit held that to prove a conspiracy to commit extortion, the statute requires the government to show that the conspirators "formed an agreement to obtain property from someone outside the conspiracy." *Brock*, 501 F.3d at 767. That legal holding has nothing to do with whether the defendant paid the bribe or received it.

The government also proposes that the split could resolve itself because "the Sixth Circuit might modify or narrow that rule if confronted with a case such as this." Opp. 11. And if wishes were horses, beggars would ride. But the Sixth Circuit has correctly interpreted the statute and there is no reason to expect that it would convert to the government's flawed reading. Certainly nothing in *Brock* or any other decision suggests that the Sixth

Circuit would change its statutory interpretation merely because a public official is the defendant. Nor is there any reason to wait for the Sixth Circuit to "clarif[y] its position," Opp. 12; its position is already perfectly clear.

In the same vein, the government contends that *Brock* relied on the fact that the defendants there could not be "held liable for the substantive crime of extortion." Opp. 11. That is also wrong. To be sure, the Sixth Circuit noted that "[a]ll agree that the Brocks did not commit a substantive act of extortion," but it made that observation in the context of describing the statutory framework. *Brock*, 501 F.3d at 767. The Sixth Circuit's *holding* turned on its interpretation of what the statutory language requires; the absence of a substantive extortion conviction was irrelevant. *See id.*; *see also United States Nat'l Bank of Ore. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 463 n.11 (1993) (emphasizing "the need to distinguish an opinion's holding from its dicta").

Finally, the government asserts that "the Sixth Circuit's concern about 'transform[ing] the Act into a prohibition on paying bribes to public officials' is not implicated here." Opp. 11. In fact, the decision below achieves exactly that transformation. The Fourth Circuit held that, "where a defendant is charged with conspiring to commit Hobbs Act extortion, the prosecution must show that the object of the conspiracy was for the conspiring public official to extort property from someone other than himself." App. 23. Under that interpretation, the government can impose criminal liability on a bribe-payer merely

by showing that he helped a public official "extort property from someone other than himself," which the government can do simply by showing that the defendant paid a bribe to a public official. Under the Fourth Circuit's interpretation—directly contrary to the Sixth Circuit's interpretation—the Hobbs Act effectively imposes criminal liability on those who *pay* bribes in addition to the officials who receive them. *Compare* App. 23 *with Brock*, 501 F.3d at 767; *see also* Pet. 14–15.

II. The Decision Below Is Wrong.

The Court should also grant review because the Fourth Circuit's decision mangles the statutory text. *See* Pet. 13–17. Under the Hobbs Act, a conspiracy to commit extortion under color of official right requires that the conspirators agree to obtain property "from another, with his consent"—*i.e.*, from someone outside the conspiracy. 18 U.S.C. § 1951(b)(2). To say that the "another" can be one of the co-conspirators makes no sense; if two people agree to obtain property "from another," an innocent third party has to be involved. And, in any event, if there were ambiguity, the rule of lenity should resolve it in petitioner's favor. *See* Pet. 13; *see also Brock*, 501 F.3d at 768–69.

The government does not grapple with these textual points or with the rule of lenity. Instead, it asserts that "[p]roperty from 'another' refers to property not belonging to that official" and that "the phrase 'with his consent' refers to the consent of someone other than the public official." Opp. 7. But *every* instance of color-of-official-right extortion involves a consensual agreement between a public

official and someone offering money in exchange for the performance of an official act. *See Evans v. United States*, 504 U.S. 255, 268 (1992). If the government's tortured reading were correct, a public official would be guilty of conspiracy whenever the government could prove a substantive violation of § 1951(a)—rendering § 1951(a)'s express distinction between its substantive offense and conspiracy wholly superfluous. *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (when interpreting a statute, "no clause, sentence, or word shall be superfluous, void, or insignificant").

The government all but concedes that under its interpretation every substantive conspiracy also constitutes a conspiracy to commit extortion. In fact, the government doubles down on that atextual result, arguing that "if a bribe-payer can be 'another' for purposes of a substantive Hobbs Act violation, it is difficult to see how that same person can lose his status as 'another' solely by virtue of a conspiracy charge." Opp. 8. But that is not difficult to see at all. "The essence of the crime of conspiracy is agreement." *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975). When one person uses his official position to obtain property from someone else, the public official has obtained property "from another" "with his consent" and can be convicted of the substantive offense of extortion. But when multiple people "agree[]" to obtain property from only themselves, it makes no sense to say that the conspirators have conspired to obtain their own consent. As *Brock* put it, "[h]ow do, (or why would) people conspire to obtain their own consent?" 501 F.3d at 767; *see also* Pet. 13–17 & n.2.

Missing the point, the government suggests that applying the statute as written would be "bizarre" because "[i]f petitioner had been charged of conspiring *solely* with his fellow BPD officers, then both elements—'property from another' and 'with consent'—would be satisfied" but a "conspiracy charge that *also* includes Moreno as a willing participant is beyond the statute's reach." Opp. 8. But the facts of a crime should matter and, under the Hobbs Act, it makes a difference whether petitioner was conspiring to obtain money from the bribe-payer or conspiring to take property from another. There is certainly nothing impossible about Congress distinguishing between situations involving bribes where property is merely exchanged between the conspirators themselves, and situations where the wrongdoers conspire to extort money from innocent victims under color of official right. That is not the kind of absurdity that could justify the "extraordinary" step of rewriting the plain statutory text. *See generally Public Citizen v. Dep't of Justice*, 491 U.S. 440, 471 (1989) (Kennedy, J., concurring in judgment).

Finally, in an effort to avoid concerns about unworkability, the government reinterprets the Fourth Circuit's "active participant" standard to merely restate basic conspiracy principles; the government says that the Fourth Circuit's distinction is equivalent to determining whether a bribe-payer is "simply complying with an official demand" or "knowingly participating in the criminal agreement." Opp. 9. But that puts the government between a rock and a hard place. The government's view of the "active participant" standard resurrects the problem

that standard was meant to solve: the Hobbs Act's "with his consent" requirement ensures that *every* bribe-payer is "knowingly participating in the criminal agreement," so the government's interpretation would turn every substantive extortion offense into an additional conspiracy to commit extortion. If the "active participant" standard is to avoid that problem, it has to do additional work beyond merely requiring a knowing agreement. But if that standard requires courts to "determine what level of enthusiasm, ambivalence, or regret is required to escape prosecution," *Brock*, 501 F.3d at 771, the test is completely vague, unworkable, and unmoored to the statutory text. *See* Pet. 16–17; *Brock*, 501 F.3d at 771. The government's conundrum vividly illustrates why the Sixth Circuit's decision is correct. If the statute is applied according to its plain terms, there is no need for the Fourth Circuit's confusing, extra-textual gloss.

III. The Question Presented is Important and Squarely Presented.

Seeking to deter this Court from resolving the circuit split and enforcing the statute, the government tries to conjure up an alternative basis for affirmance. According to the government, this case is not an appropriate vehicle because the jury could have found that petitioner did not conspire with Moreno and Mejia, but instead conspired only with other Baltimore Police officers. Opp. 12–13.

That is not how the case was framed or litigated below. Even the government acknowledges that it "did not emphasize the point in its closing argument

or in its appellate brief." Opp. 13. And even if it had, the newly-minted "BPD-only" conspiracy theory is contradicted by what the indictment says. The conspiracy count alleged that petitioner "agree[d] with other [BPD officers], *and with Moreno and Mejia* to unlawfully obtain under color of official right, money and other property *from Moreno, Mejia, and [the Majestic Repair Shop]*, with their consent." App. 4 (emphasis added). Under any tenable reading, the indictment alleges a conspiracy that included an agreement with Moreno and Mejia—the bribe-payers—to obtain property from them (and not from anyone else). The made-up BPD-only position, by contrast, advances a counter-factual theory where Moreno and Mejia were *not* co-conspirators but innocent third-parties. Far from being "factually lesser-included," Opp. 13, the BPD-only conspiracy theory thus directly conflicts with the indictment. It cannot provide an independent basis for affirmance.

Putting aside its many distractions, the government cannot dispute that this case raises recurring and important questions about Congress's power to define and punish federal crimes. *See* Pet. 19–0. That issue has taken on renewed importance in recent years as the government continues on its course of expanding criminal statutes beyond what their text can possibly bear. *See, e.g.*, *Skilling v. United States*, 561 U.S. 358 (2010) (honest services fraud); *Yates v. United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013), *cert. granted* 134 S. Ct. 1935 (2014) (whether a fish is a "tangible object" under the securities laws). The decision below expands the scope of the Hobbs Act in a manner that cannot be

reconciled with what Congress said. And it relies on a strained, open-ended interpretation of the statute that does not give fair notice about what is prohibited. In the end, as this case attests, this Court has an important function in enforcing the rule of lenity and protecting against the creeping expansion of federal crimes. The Court should perform that function here by granting review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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Supreme Court, U.S.
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No. 14-361

In the
Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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Petition for Writ of Certiorari filed September 25, 2014
Petition for Writ of Certiorari Granted March 2, 2015

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RELEVANT DOCKET ENTRIES

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMUEL OCASIO, ET AL.,

Defendants.

No. 1:11-cr-122-CCB

Judge Catherine C. Blake

Date Filed	#	Docket Text
		* * *
02/23/2011	41	Initial Appearance as to Samuel Ocasio (Defendant informed of Rights.) held on 2/23/2011 before Magistrate Judge Paul W. Grimm. (FTR Gold) (std, Deputy Clerk) [1:11-mj-00662-PWG] Modified on 3/10/2011 (bmh, Deputy Clerk). (Entered: 02/25/2011)
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3/9/2011	75	INDICTMENT as to Hernan Alexis Moreno Mejia (1) count(s) 1, Edwin Javier Mejia (2) count(s) 1, Eddy Arias (3) count(s) 1, Rodney Cintron (5) count(s) 1, Jhonn S Corona (6) count(s) 1, Michael Lee Cross (7) count(s) 1, Jerry Edward Diggs, Jr (8) count(s) 1, Rafael Concepcion Feliciano, Jr (9) count(s) 1, Samuel Ocasio (13) count(s) 1, Leonel Rodriguez Torres (16) count(s) 1, Marcos Fernando Urena (17) count(s) 1, Henry Yambo (19) count (s) 1. (bmh, Deputy Clerk) (Entered: 03/10/2011)
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3/25/2011	110	Initial Appearance as to Samuel Ocasio (Defendant informed of Rights.) held on 3/25/2011 before Magistrate Judge Susan K. Gauvey. (FTR Gold: Goldsmith) (hsg, Deputy Clerk) (Entered: 03/25/2011)
3/25/2011	111	Arraignment as to Samuel Ocasio (13) Count 1 held on 3/25/2011, Plea entered by Samuel Ocasio Not Guilty on count 1 before Magistrate Judge Susan K. Gauvey. (FTR Gold: Goldsmith) (hsg, Deputy Clerk) (Entered: 03/25/2011)

* * *		
5/27/201	123	MOTION for Speedy Trial Status by USA as to Hernan Alexis Moreno Mejia, Edwin Javier Mejia, Eddy Arias, Rodney Cintron, Jhonn S Corona, Michael Lee Cross, Jerry Edward Diggs, Jr, Rafael Concepcion Feliciano, Jr, Samuel Ocasio, Leonel Rodriguez Torres, Marcos Fernando Urena, Henry Yambo. Responses due by 6/13/2011 (Attachments: # 1 Text of Proposed Order) (Gavin, Kathleen) (Entered: 05/27/2011)
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* * *		

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06/06/2012	208	JUDGMENT as to Samuel Ocasio (13), Count(s) 1, DISMISSED; Count(s) 1s, 5s-7s, IMPRISONMENT for a total term of 18 months to run concurrent with each other; SUPERVISED RELEASE for a term of 3 years to run concurrent to each other; RESTITUTION in the amount of $1,500.00; ASSESSMENT of $400.00. Signed by Judge Catherine C. Blake on 6/5/12 (c/m 6/7/12 cags, Deputy Clerk) (Entered: 06/07/2012)
		* * *
06/14/2012	210	NOTICE OF APPEAL by Samuel Ocasio re 208 Judgment, Fee Status: CJA. (Crowe, Thomas) (Entered: 06/14/2012)
06/15/2012	211	MOTION for Hearing on Restitution by USA as to Samuel Ocasio. Responses due by 7/2/2012 (Attachments: # 1 Exhibit One) (Kelly, Tonya) (Entered: 06/15/2012)

06/15/2012	212	Transmission of Notice of Appeal and Docket Sheet as to Samuel Ocasio to US Court of Appeals re 210 Notice of Appeal Final Judgment. (sls, Deputy Clerk) (Entered: 06/15/2012)
06/18/2012	213	USCA Case Number 12-4462 as to Samuel Ocasio for 210 Notice of Appeal Final Judgment filed by Samuel Ocasio Case Manager Cathy Tyree. (sls, Deputy Clerk) (Entered: 06/18/2012)
* * *		
06/29/2012	217	RESPONSE in Opposition by Samuel Ocasio re 211 MOTION for Hearing on Restitution (Crowe, Thomas) (Entered: 06/29/2012)
* * *		
07/23/2012	224	Motion Hearing as to Samuel Ocasio held on 7/23/2012 re 211 MOTION for Hearing on Restitution filed by USA before Judge Catherine C. Blake. (Court Reporter: Gail Simpkins) (kam, Deputy Clerk) (Entered: 07/23/2012)
07/23/2012	225	EXHIBIT LIST by USA as to Samuel Ocasio (jnls, Deputy Clerk) (Entered: 07/23/2012)

07/23/2012	226	EXHIBIT LIST by Samuel Ocasio (jnls, Deputy Clerk) (Entered: 07/23/2012)
07/23/2012	227	Stipulation re: Return of Exhibits to Counsel (jnls, Deputy Clerk) (Entered: 07/23/2012)
07/23/2012	228	AMENDED JUDGMENT as to Samuel Ocasio (13), Count(s) 1, DISMISSED; Count(s) 1s, 5s-7s, IMPRISONMENT for a total term of 18 months as to Counts 1s, 5s, 6s & 7s to run concurrent to each other; SUPERVISED RELEASE for a term of 3 years as to Counts 1s, 5s, 6s & 7s to run concurrent to each other; RESTITUTION in the amount of $3370.58; ASSESSMENT of $400.00. Signed by Judge Catherine C. Blake on 7/23/12. (c/m 7/24/12 jnls, Deputy Clerk) (Entered: 07/24/2012)
* * *		
07/26/2012	230	NOTICE OF APPEAL by Samuel Ocasio re 228 Amended Judgment, Fee Status: CJA. (Crowe, Thomas) (Entered: 07/26/2012)

07/30/2012	231	Transmission of Notice of Appeal and Docket Sheet as to Samuel Ocasio to US Court of Appeals re 230 Notice of Appeal Final Judgment. (bf2, Deputy Clerk) (Entered: 07/30/2012)
07/30/2012	232	MOTION for Extension of Time to Surrender by Samuel Ocasio. Responses due by 8/16/2012 (Attachments: # 1 Text of Proposed Order) (Crowe, Thomas) (Entered: 07/30/2012)
		* * *
07/30/2012	234	SURRENDER ORDER as to Samuel Ocasio. Signed by Judge Catherine C. Blake on 7/30/12. (jnls, Deputy Clerk) (Entered: 07/31/2012)
		* * *
04/29/2014	294	JUDGMENT of USCA (certified copy) "AFFIRMING" in part; "VACATING" in part the judgment of the District Court and "REMANDING" to the District Court for further proceedings consistent with the court's decision as to Samuel Ocasio re 210 Notice of Appeal Final Judgment. (sls, Deputy Clerk) (Entered: 04/29/2014)

05/14/2014	295	STAY OF MANDATE of USCA (certified copy) as to Samuel Ocasio re 210 Notice of Appeal Final Judgment. (sls, Deputy Clerk) (Entered: 05/14/2014)
05/28/2014	296	ORDER of USCA (certified copy) "DENYING" petition for rehearing en banc as to Samuel Ocasio re 210 Notice of Appeal Final Judgment. (sls, Deputy Clerk) (Entered: 05/28/2014)
06/05/2014	297	MANDATE of USCA (certified copy) as to Samuel Ocasio re 210 Notice of Appeal Final Judgment. (sls, Deputy Clerk) (Entered: 06/05/2014)
07/02/2014	298	AMENDED JUDGMENT as to Samuel Ocasio (13), Count(s) 1, DISMISSED; Count(s) 1s, 5s-7s, IMPRISONMENT for a total term of 18 months as to Counts 1s, 5s, 6s & 7s to run concurrent to each other; SUPERVISED RELEASE for a term of 3 years as to Counts 1s, 5s, 6s & 7s to run concurrent to each other; ASSESSMENT of $400.00; RESTITUTION in the amount of $1,500.00. Signed by Judge Catherine C. Blake on 07/01/2014. (bas, Deputy Clerk) (Entered: 07/02/2014)
* * * *		

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RELEVANT DOCKET ENTRIES

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMUEL OCASIO,

Defendant Appellant.

No. 14-4462

Date Filed	#	Docket Text
06/18/2012	1	Criminal case docketed. Originating case number: 1:11-cr-00122-CCB-13. Date notice of appeal filed: 04/14/2012. Case manager: CTyree. [12-4462] (CT)
* * *		
06/18/2012	4	DOCKETING NOTICE issued Re: [1] case docketed Initial forms due within 14 days. Originating case number: 1:11-cr-00122-CCB-13. [12-4462] (CT)
* * *		

6/19/2012	8	ASSEMBLED ELECTRONIC RECORD docketed. Originating case number: 1:11-cr-00122-CCB-13. Record in folder? Yes. Record reviewed? Yes. [12-4462] (CT)
* * *		
07/10/2012	13	DOCKETING STATEMENT by Appellant Samuel Ocasio.
* * *		
01/07/2013	40	MOTION by Appellant Samuel Ocasio to extend filing time for opening brief and appendix until March 18, 2013.
01/08/2013	41	ORDER filed [999017322] granting Motion to extend filing time [40], updating briefing order deadlines. Opening brief and appendix due 03/18/2013. Response brief due 04/15/2013. Copies to all parties. [12-4462] (CT)
03/11/2013	42	MOTION by Appellant Samuel Ocasio to exceed length limitations for appendix.
03/11/2013	43	ORDER filed [999060850] granting Motion to exceed length limitations [42] Copies to all parties. [12-4462] (CT)
* * *		

03/18/2013	45	BRIEF by Appellant Samuel Ocasio in electronic and paper format. Type of Brief: Opening.
03/18/2013	46	FULL ELECTRONIC APPENDIX and full paper appendix by Appellant Samuel Ocasio.
03/18/2013	48	CERTIFICATE OF CONFIDENTIALITY (Local Rule 25(c)) by Samuel Ocasio.
		* * *
03/29/2013	50	MOTION by Appellee US to extend filing time for response brief until May 15, 2013.
03/29/2013	51	ORDER filed [999075874] granting Motion to extend filing time [50], updating/resuming briefing order deadlines. Response brief due 05/15/2013 Copies to all parties. [12-4462] (DSD)
03/18/2013	52	OPENING BRIEF (PAPER) file-stamped, on behalf of Samuel Ocasio. Number of pages: 63. Sufficient: YES. Entered on Docket Date: 04/03/2013. [999079198] [12-4462] (CB)
		* * *
04/03/2013		Appendix [46] released to public. [12-4462] (CB)
		* * *

04/03/2013	54	ORDER filed [999079211] sealing Volume Four of the Joint Appendix. Copies to all parties. [12-4462] (CB)
	* * *	
05/15/2013	57	RESPONSE BRIEF (PAPER) file-stamped, on behalf of US.
05/28/2013	58	BRIEF by Appellant Samuel Ocasio in electronic and paper format. Type of Brief: Reply. . . .
05/28/2013	59	REPLY BRIEF (PAPER) file-stamped, on behalf of Samuel Ocasio. Number of pages: [38]. Sufficient: YES. Entered on Docket Date: 05/30/2013.
	* * *	
10/18/2013	68	CASE CALENDARED for oral argument. Date: 12/11/2013.
	* * *	
12/05/2013	75	COURT ORDER filed [999253773] granting Motion to file corrected document [71] Description of corrected document: response brief. Copies to all parties.

12/11/2013	76	ORAL ARGUMENT heard before the Honorable Diana Gribbon Motz, Robert B. King and Dennis W. Shedd. Attorneys arguing case: Attorney Mr. Matthew Scott Owen for Appellant Samuel Ocasio. Courtroom Deputy: Jackie Quella.
		* * *
04/29/2014	78	PUBLISHED AUTHORED OPINION filed.
04/29/2014	79	JUDGMENT ORDER filed. Disposition method: 12-4462 opn.p.arg. Decision: Affirmed in part, vacated in part, and remanded.
04/29/2014	80	Copy of judgment and certiorari status form transmitted to defendant and counsel. [79] Judgment Order, [78] Published Authored Opinion. Copy mailed to defendant? No. Address of Defendant: Current address unavailable to court. Counsel to locate defen[d]ant and serve with judgment.
05/13/2014	81	PETITION for rehearing en banc (FRAP 35) by Appellant Samuel Ocasio.
05/14/2014	82	Mandate stayed by FRAP 41(d)(1). [12-4462] (CT)

05/28/2014	83	COURT ORDER filed [999364126] denying Motion for rehearing en banc [81] Copies to all parties. [12-4462] (CT)
06/05/2014	84	Mandate issued. Referencing: [79] Judgment Order, [78] Published Authored Opinion.
07/02/2014	85	Certiorari status form issued to Appellant Samuel Ocasio after denial of rehearing. Certiorari Status Form due 09/02/2014 for Samuel Ocasio. [12-4462] (LM)
07/16/2014	86	CERTIORARI STATUS FORM by Appellant Samuel Ocasio. [12-4462].
07/24/2014	87	SUPREME COURT REMARK extension granted to file petition for writ of certiorari. Petition for certiorari now due: September 25, 2014. [12-4462] (ABW)
* * *		
09/30/2014	90	SUPREME COURT REMARK petition for writ of certiorari filed. 09/25/2014. 14-361. [12-4462] (ABW)
03/02/2015	91	SUPREME COURT REMARK petition for writ of certiorari granted. 03/02/2015 [12-4462] (SJC)
* * * *		

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

SAMUEL OCASIO, et al.

Defendants.

CRIMINAL No. CCB-11-0122

(Conspiracy; 18 U.S.C. § 371)

INDICTMENT

COUNT ONE

The Grand Jury for the District of Maryland charges that:

INTRODUCTION

Relevant Persons and Entities

At all times relevant to this Indictment:

1. **Hernan Alexis MORENO Mejia** was a resident of Rosedale, Maryland. MORENO was a co-owner of Majestic Auto Repair Shop LLC ("Majestic") located in Rosedale, Maryland.

2. **Edwin Javier MEJIA** was a resident of Middle River, Maryland. MEJIA was an employee of MAJESTIC.

3. Majestic was an automobile repair facility engaged in the business of providing both towing and automobile repair services, the activities of which affected interstate commerce.

4. **Eddy ARIAS** was a resident of Catonsville, Maryland and was employed as an active duty police officer with the Baltimore Police Department ("BPD"), assigned to patrol in the Southeastern District.

5. **Rodney CINTRON** was a resident of Middle River, Maryland and was employed as a police officer with the BPD, assigned to patrol in the Northeast District. On July 19, 2010, CINTRON was placed on disciplinary suspension.

6. **Jhonn S. CORONA** was a resident of Rosedale, Maryland and was employed as an active duty police officer with the BPD, assigned to patrol in the Eastern District.

7. **Michael Lee CROSS** was a resident of Reisterstown, Maryland and was employed as an active duty police officer with the BPD, assigned to patrol in the Northeast District.

8. **Jerry Edward DIGGS, Jr.** was a resident of Baltimore, Maryland and was employed as an active duty police officer with the BPD, assigned to patrol in the Northeast District.

9. **Rafael Concepcion FELICIANO, Jr.** was a resident of Baltimore, Maryland and was employed as an active duty police officer with the BPD, assigned to patrol in the Northeast District.

10. **Samuel OCASIO** was a resident of Edgewood, Maryland and was employed as an active duty police officer with the BPD, assigned to patrol in the Southern District.

11. **Leonel RODRIGUEZ** Torres was a resident of Edgewood, Maryland and was employed as an active duty police officer with the BPD, assigned to patrol in the Northeast District.

12. **Marcos Fernando URENA** was a resident of Baltimore, Maryland and was employed as an active duty police officer with the BPD, assigned to patrol in the Southwest District.

13. **Henry YAMBO** was a resident of Reisterstown, Maryland and was employed as an active duty police officer with the BPD, assigned to patrol in the Northeast District.

14. **"Medallion" tow companies** are towing companies that are under contract with the City of Baltimore to provide towing services at accident scenes for the BPD. Medallion tow companies receive a numbered medallion sticker that is issued by the Traffic Unit's Towing Office that they are required to affix to the left cowl of the towing vehicle(s). Majestic was not a medallion tow company.

Baltimore Police Department General Orders

15. The Police Commissioner of the BPD is authorized to pass General Orders that regulate BPD business. B[PD] officers are required to follow the General Orders in the course of their employment. BPD General Orders are communicated to BPD Officers through various means, including, but not limited to, departmental mail and e-mail.

16. BPD General Order C-2 (Rules and Regulations), published July 15, 2003, specifically provides that "no member of the Department shall

violate any Federal or State law, or City ordinance," (Rule 1, Section 18), and that "no compensation, reward, gift, or other consideration, shall be solicited or accepted by members without special permission of the Police Commissioner." (Rule 1, Section 30).

17. The stated purpose of BPD General Order 1-2 (Towing Procedures), published April 23, 2010, is to reaffirm the BPD's policies and procedures for the towing of civilian vehicles and is designed to safeguard the public interest against fraud, deception and similar abuses. BPD General Order 1-2, and the previous version of that Order, which had been published June 6, 1996, requires that when police request vehicle towing services, BPD Officers will only use medallion tow companies for police tows as authorized by the Communications Section. General Order 1-2 requires that when a BPD officer arrives at the scene of an accident, disability or emergency, the investigating officer at the scene shall promptly determine if a disabled vehicle needs to be towed from a city street. In all non-emergency situations, and in emergency situations prior to April 23, 2010, the officer shall permit the operator or owner of the car to contact a bona fide automobile or motor club of his or her choice, of which he or she is a member, an automobile insurance company with which he is insured, or a licensed towing vehicle. If the owner declines, is unable to do so, or the towing vehicle does not respond within twenty minutes, then the officer shall call, via the Communications Section, a medallion towing company.

THE CONSPIRACY

18. From in or about the Spring of 2008, and continuing through at least February 2011, the exact dates being unknown to the Grand Jury, in the District of Maryland and elsewhere,

Hernan Alexis MORENO Mejia
Edwin Javier MEJIA
Eddy ARIAS
Rodney CINTRON
Jhonn S. CORONA
Michael Lee CROSS
Jerry Edward DIGGS, Jr.
Rafael Concepcion FELICIANO Jr.
Samuel OCASIO
Leonel RODRIGUEZ Torres
Marcos Fernando URENA
and
Henry YAMBO

the defendants (herein collectively referred to as "the BPD Officers"), and others both known and unknown to the Grand Jury, did knowingly and unlawfully combine, conspire, confederate, and agree together and with each other to obstruct, delay, and affect commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain under color of official right, money and other property from MORENO, MEJIA, and Majestic, with their consent, not due the BPD Officers or their official position, in violation of Title 18, United States Code, Section 1951(a).

PURPOSE OF THE CONSPIRACY

19. It was a purpose of the conspiracy for MORENO and MEJIA to enrich the BPD Officers and to benefit MORENO and MEJIA by issuing payments to the BPD Officers in exchange for the BPD Officers' exercise of their official positions and influence to cause vehicles to be towed or otherwise delivered to Majestic for automobile services and repair.

THE MANNER AND MEANS OF THE CONSPIRACY

20. It was part of the conspiracy that MORENO and MEJIA paid the BPD Officers in exchange for the BPD Officers arranging for Majestic or a company used by Majestic, rather than a medallion company or some other towing company, to tow or otherwise obtain vehicles from accident scenes or other locations.

21. It was further part of the conspiracy that the BPD Officers agreed to use and did use their official positions and influence to cause vehicles to be delivered to Majestic pursuant to the following general pattern:

a. Shortly after the BPD dispatched the BPD Officer to an accident scene or a BPD Officer otherwise arrived at an accident or located a damaged vehicle, the BPD Officer contacted MORENO or the BPD Officer used the vehicle owner's cellular telephone to contact MORENO;

b. The BPD Officer provided MORENO with the relevant details about the potential vehicles

for MORENO, including the type and extent of the damage, whether the air bag deployed, the type of insurance on the car and the insurance carrier, whether the car was driveable, the location of the vehicle, and the contact information for the car's owner;

c. The BPD Officer informed the owner of the vehicle that Majestic could tow the car, provide auto repair services, help with the insurance claim, assist in getting a rental car, waive the deductible, and that the owner must not call their insurance company until after speaking with MORENO;

d. a Majestic truck, or a truck from another towing company used by Majestic, would arrive at the scene and tow the vehicle to Majestic, even if the vehicle was not actually disabled, or, in some instances, the vehicle was driven to Majestic by MORENO or the owner;

e. the BPD Officer falsely stated in his Maryland Motor Vehicle Accident Report, if one was prepared, that the vehicle owners arranged for their own tow or the BPD Officer intentionally left the box blank in the report as to towing or vehicle removal methods;

f. if the car stayed at Majestic, a claim was submitted to the insurance company for payment for towing, repairs allegedly made by Majestic, or both; and

g. MORENO or MEJIA and the BPD Officer later arranged to meet so that MORENO or MEJIA could pay the BPD Officer in cash or check

for steering the car owner to use Majestic for tow and automobile repair services.

OVERT ACTS

22. In furtherance of the conspiracy and to effect the purpose of the conspiracy, at least one of the conspirators performed and caused to be performed, at least one of the following overt acts on or about the dates set forth below, in the District of Maryland and elsewhere:

a. On or about January 25, 2010, MORENO and MEJIA issued a check, drawn on a Majestic business account and made payable to R. CINTRON, in the amount of $450.

b. On or about November 16,2010, DIGGS called MORENO at approximately 3:29 p.m. and told MORENO that he would have a 2005 Dodge Avenger for him the following day.

c. On or about November 25,2010, RODRIGUEZ called MORENO at approximately 10:51 p.m. and explained that he speaks to accident victims before writing an accident report in order to give MORENO time to get to the accident scene.

d. On or about December 8, 2010, FELICIANO sent a text message to MORENO at approximately 2:38 p.m. in which he stated "Hey bro, did everything go through with both cars cause I need some cash today? I'm tight with money and want to get some things before work later."

e. On or about December 16, 2010, at approximately 4:31 p.m., CORONA drove a

Trailblazer, which had been in an accident several hours earlier, onto the lot of Majestic.

f. On or about December 27,2010, URENA called MORENO and discussed when MORENO would pay URENA for sending cars to Majestic.

g. On or about January 23, 2011, ARIAS called MORENO at approximately 5:03 p.m. regarding a 1998 Toyota Four Runner that had been involved in a hit and run.

h. On or about January 31, 2011, CROSS called MORENO at approximately 9:49 a.m. regarding a vehicle that CROSS referred to MORENO.

i. On or about January 31, 2011, YAMBO called MORENO at approximately 5:01 p,m. and discussed a 2008 Toyota Camry that YAMBO was sending to Majestic from an accident scene.

18 U.S,C. § 371

/s/
Rod J. Rosenstein
United States Attorney

A TRUE BILL

[SIGNATURE REDACTED]
Foreperson

Date: March 9, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	**CRIMINAL No. CCB-11-0122**
v.	
KELVIN QUADE MANRICH	
SAMUEL OCASIO	**(Conspiracy; 18 U.S.C. § 371; Extortion Under Color of Official Right, 18 U.S.C. § 1951(a), Aiding and Abetting, 18 U.S.C. § 2)**
Defendants.	

SUPERSEDING INDICTMENT

COUNT ONE

The Grand Jury for the District of Maryland charges that:

INTRODUCTION

Relevant Persons and Entities

At all times relevant to this Indictment:

1. Hernan Alexis Moreno Mejia was a resident of Rosedale, Maryland. Moreno was a co-owner of Majestic Auto Repair Shop LLC ("Majestic") located in Rosedale, Maryland.

2. Edwin Javier Mejia was a resident of Middle River, Maryland. Mejia was a co-owner of Majestic.

3. Majestic was an automobile repair facility engaged in the business of providing both towing and automobile repair services, the activities of which affected interstate commerce.

4. **Kelvin Quade MANRICH** was a resident of Middle River, Maryland and was employed as an active duty police officer with the Baltimore Police Department ("BPD"), assigned to patrol in the Northeast District.

5. **Samuel OCASIO** was a resident of Edgewood, Maryland and was employed as an active duty police officer with the BPD, assigned to patrol in the Southern District.

6. "Medallion" tow companies are towing companies that are under contract with the City of Baltimore to provide towing services at accident scenes for the BPD. Medallion tow companies receive a numbered medallion sticker that is issued by the BPD's Traffic Unit's Towing Office that they are required to affix to the left cowl of the towing vehicle(s). Majestic was not a medallion tow company.

Baltimore Police Department General Orders

7. The Police Commissioner of the BPD is authorized to pass General Orders that regulate BPD business. B[PD] officers are required to follow the General Orders in the course of their employment. BPD General Orders are communicated to BPD

Officers through various means, including, but not limited to, departmental mail and e-mail.

8. BPD General Order C-2 (Rules and Regulations), published July 15, 2003, specifically provides that "no member of the Department shall violate any Federal or State law, or City ordinance," (Rule 1, Section 18), and that "no compensation, reward, gift, or other consideration, shall be solicited or accepted by members without special permission of the Police Commissioner." (Rule 1, Section 30).

9. The stated purpose of BPD General Order I-2 (Towing Procedures), published April 23, 2010, is to reaffirm the BPD's policies and procedures for the towing of civilian vehicles and is designed to safeguard the public interest against fraud, deception and similar abuses. BPD General Order I-2, and the previous version of that Order, which had been published June 6, 1996, requires that when police request vehicle towing services, BPD Officers will only use medallion tow companies for police tows as authorized by the Communications Section. General Order I-2 requires that when a BPD officer arrives at the scene of an accident, disability or emergency, the investigating officer at the scene shall promptly determine if a disabled vehicle needs to be towed from a city street. In all non-emergency situations, and in emergency situations prior to April 23, 2010, the officer shall permit the operator or owner of the car to contact a bona fide automobile or motor club of his or her choice, of which he or she is a member, an automobile insurance company with which he is insured, or a licensed towing vehicle. If the owner declines, is unable to do so, or the towing vehicle does

not respond within twenty minutes, then the officer shall call, via the Communications Section, a medallion towing company.

THE CONSPIRACY

10. From in or about the Spring of 2008, and continuing through at least February 2011, the exact dates being unknown to the Grand Jury, in the District of Maryland and elsewhere,

Kelvin Quade MANRICH
Samuel OCASIO

the defendants, and others both known and unknown to the Grand Jury, did knowingly and unlawfully combine, conspire, confederate, and agree together, with other Baltimore Police Department Officers ("BPD Officers"), and with Moreno and Mejia to obstruct, delay, and affect commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain under color of official right, money and other property from Moreno, Mejia, and Majestic, with their consent, not due the defendants or their official position, in violation of Title 18, United States Code, Section 1951(a).

PURPOSE OF THE CONSPIRACY

11. It was a purpose of the conspiracy for Moreno and Mejia to enrich over 50 BPD Officers, including the defendants, and to benefit Moreno and Mejia by issuing payments to the BPD Officers in exchange for the BPD Officers' exercise of their official positions and influence to cause vehicles to be towed or

otherwise delivered to Majestic for automobile services and repair.

MANNER AND MEANS OF THE CONSPIRACY

12. It was part of the conspiracy that Moreno and Mejia paid the defendants and other BPD Officers in exchange for them arranging for Majestic or a company used by Majestic, rather than a medallion company or some other towing company, to tow or otherwise obtain vehicles from accident scenes or other locations.

13. It was further part of the conspiracy that the defendants and other BPD Officers agreed to use and did use their official positions and influence to cause vehicles to be delivered to Majestic pursuant to the following general pattern:

a. Shortly after the BPD dispatched a BPD Officer to an accident scene or a BPD Officer otherwise arrived at an accident or located a damaged vehicle, the BPD Officer contacted Moreno or used the vehicle owner's cellular telephone to contact Moreno;

b. The BPD Officer provided Moreno with the relevant details about the potential vehicles for Moreno, including the type and extent of the damage, whether the air bag deployed, the type of insurance on the car and the insurance carrier, whether the car was driveable, the location of the vehicle, and the contact information for the car's owner;

c. The BPD Officer informed the owner of the vehicle that Majestic could tow the car, provide auto repair services, help with the insurance claim,

assist in getting a rental car, waive the deductible, and that the owner must not call their insurance company until after speaking with Moreno or Mejia;

d. a Majestic truck, or a truck from another towing company used by Majestic, would arrive at the scene and tow the vehicle to Majestic, even if the vehicle was not actually disabled, or, in .some instances, the vehicle was driven to Majestic by Moreno, Mejia or the owner;

e. the BPD Officer falsely stated in his Maryland Motor Vehicle Accident Report, if one was prepared, that the vehicle owners arranged for their own tow or the BPD Officer intentionally left the box blank in the report as to towing or vehicle removal methods;

f. if the car stayed at Majestic, a claim was submitted to the insurance company for payment for towing, repairs allegedly made by Majestic, or both; and

g. Moreno or Mejia and the BPD Officer later arranged to meet so that Moreno or Mejia could pay the BPD Officer in cash or check for steering the car owner to use Majestic for tow and automobile repair services.

OVERT ACTS

14. In furtherance of the conspiracy and to effect the purpose of the conspiracy, at least one of the conspirators performed and caused to be performed, at least one of the following overt acts on or about the dates set forth below, in the District of Maryland and elsewhere:

a. On or about December 14, 2010, at approximately 5:52 p.m., **MANRICH** called Moreno and told Moreno that he and another BPD officer were going to split a payment from Moreno for a vehicle that **MANRICH** had sent to Majestic from a hit and run scene.

b. On or about January 15, 2011, **OCASIO** called Moreno, but the call went to voice mail. Moreno immediately called **OCASIO** back and during that call, **OCASIO** stated that he needed a tow truck at Russell Street in front of the Holiday Inn.

c–h. Counts Two through Seven are hereby incorporated as Overt Acts of the conspiracy.

18 U.S.C.§ 371

The Grand Jury further charges that:

COUNT TWO

1. Paragraphs 1 through 9 and 11 through 13 of Count One are incorporated and re-alleged here.

2. On or about December 24, 2010, in the District of Maryland and elsewhere, the defendant,

Kelvin Quade MANRICH

did knowingly and willfully obstruct, delay and affect interstate commerce and the movement of articles and commodities in interstate commerce by extortion, by unlawfully obtaining under color of official right, money and property from Hernan Alexis Moreno, with his consent, not due **MANRICH** as a Baltimore Police Officer or **MANRICH**'s official position.

18 U.S.C. § 1951(a)

18 U.S.C. § 2

The Grand Jury further charges that:

COUNT THREE

1. Paragraphs 1 through 9 and 11 through 13 are incorporated and re-alleged here.

2. On or about January 30, 2011, in the District of Maryland and elsewhere, the defendant,

Kelvin Quade MANRICH

did knowingly and willfully obstruct, delay and affect interstate commerce and the movement of articles and commodities in interstate commerce by extortion, by unlawfully obtaining under color of official right, money and property from Hernan Alexis Moreno, with his consent, not due **MANRICH** as a Baltimore Police Officer or **MANRICH**'s official position.

18 U.S.C. § 1951(a)

18 U.S.C. § 2

The Grand Jury further charges that:

COUNT FOUR

1. Paragraphs 1 through 9 and 11 through 13 are incorporated and re-alleged here.

2. On or about February 7, 2011, in the District of Maryland and elsewhere, the defendant,

Kelvin Quade MANRICH

did knowingly and willfully obstruct, delay and affect interstate commerce and the movement of articles and commodities in interstate commerce by extortion, by unlawfully obtaining under color of official right,

money and property from Hernan Alexis Moreno, with his consent, not due **MANRICH** as a Baltimore Police Officer or **MANRICH**'s official position.

18 U.S.C. § 1951(a)

18 U.S.C. § 2

The Grand Jury further charges that:

COUNT FIVE

1. Paragraphs 1 through 9 and 11 through 13 are incorporated and re-alleged here.

2. On or about January 17, 2010, in the District of Maryland and elsewhere, the defendant,

Samuel OCASIO

did knowingly and willfully obstruct, delay and affect interstate commerce and the movement of articles and commodities in interstate commerce by extortion, by unlawfully obtaining under color of official right, money and property from Hernan Alexis Moreno, with his consent, not due **OCASIO** as a Baltimore Police Officer or **OCASIO**'s official position.

18 U.S.C. § 1951(a)

18 U.S.C. § 2

The Grand Jury further charges that:

COUNT SIX

1. Paragraphs 1 through 9 and 11 through 13 are incorporated and re-alleged here.

2. On or about January 10, 2010, in the District of Maryland and elsewhere, the defendant,

Samuel OCASIO

did knowingly and willfully obstruct, delay and affect interstate commerce and the movement of articles and commodities in interstate commerce by extortion, by unlawfully obtaining under color of official right, money and property from Hernan Alexis Moreno, with his consent, not due **OCASIO** as a Baltimore Police Officer or **OCASIO**'s official position.

18 U.S.C. § 1951(a)

18 U.S.C. § 2

The Grand Jury further charges that:

COUNT SEVEN

1. Paragraphs 1 through 9 and 11 through 13 are incorporated and re-alleged here.

2. On or about January 15, 2011, in the District of Maryland and elsewhere, the defendant,

Samuel OCASIO

did knowingly and willfully obstruct, delay and affect interstate commerce and the movement of articles and commodities in interstate commerce by extortion, by unlawfully obtaining under color of official right, money and property from Hernan Alexis Moreno, with his consent, not due **OCASIO** as a Baltimore Police Officer or **OCASIO**'s official position.

18 U.S.C. § 1951(a)

18 U.S.C. § 2

/s/
Rod J. Rosenstein
United States Attorney

A TRUE BILL

[SIGNATURE REDACTED]
Foreperson

Date: October 19, 2011

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. **CRIMINAL No. CCB-11-0122**

SAMUEL OCASIO, et al.

Defendants.

MOTIONS HEARING

Before: The Honorable Catherine C. Blake
United States District Judge

Baltimore, Maryland

January 13, 2012

* * *

[3–6]

[MR. CROWE:]

Your Honor, as best as I am able to keep track of things, the motions that we have pending are the ones designated as number one in my omnibus motion for severance of trial from co-defendants, number four, the suppression of the wiretap evidence and derivative evidence, seven, restrictions on use of plea bargain.

Number eight is preservation of law enforcement notes. Nine is individual attorney voir dire. Ten is additional peremptory challenges, and 12 would be leave to file additional motions.

The only ones that I want to speak on today, unless, of course, the Court has questions, are

severance from trial of the co-defendants, on which I will be extraordinarily brief, and then the motion for suppression of all the wiretap evidence and evidence derivative of that.

In terms of the severance of trial of co-defendants, that was initially filed when there was a much larger cast of characters in this case. At present, Mr. Ocasio is only going to be going to trial against Mr. Manrich.

My understanding is that the case against Mr. Manrich is somewhat stronger than the case against Mr. Ocasio. We know from discovery that Mr. Manrich was apparently given a check by Alex Moreno, who is the owner of Majestic, and that that was witnessed by a civilian.

That is not the case with Mr. Ocasio. We believe that the government will have more instances of supposed improper payments to him than it does against Mr. Ocasio.

We also know that Mr. Manrich confessed at the time that he was arrested. That confession did not implicate my client. In fact, our information is that they don't know each other and had never even heard of each other until this case.

Then we also understand that he had given a proffer to the U.S. Attorney's Office.

But again, based on the disparity of evidence, and the fact that if the government gets on the stand and says that he confessed, the jury may wonder what Mr. Ocasio said when he was arrested, that we

do feel that we are entitled to a severance in that matter.

The wiretaps —

THE COURT: I'm sorry to interrupt, but why don't I hear from the government briefly on the severance, and then we will go to the wiretap.

MR. CROWE: Sure.

MS. KELLY: Thank you, Your Honor. I don't have much to add besides what's in our papers, except that there are no *Bruton* issues in this case, and there certainly are no irreconcilable defenses in this case.

While Mr. Crowe is accurate in that there are more incidents and more incidents of payments to Mr. Manrich than to Mr. Ocasio, I am not sure that the word stronger evidence is appropriate. More frequent perhaps, but what happened in the case is almost exactly the same for both defendants. There just happens to be more instances, and at trial we don't intend to put on evidence of every incident for either defendant.

So I'm not sure the disparity is even going to be as obvious to the jury. We are not going to go through 50 for Mr. Manrich and three for Mr. Ocasio. We are simply going to go through basically the substantive charges that are in the indictment, and then the witnesses will probably put flesh on that in terms of how often.

There are more calls for Mr. Manrich, but the government doesn't believe that there is case law to suggest just because one defendant was in more

contact with Mr. Moreno than the other, that that would be a basis for a severance.

Like I said, there are no *Bruton* issues, and I certainly have found no case law where one defendant confessed and the other didn't, that that's a basis for a severance.

THE COURT: Am I right in thinking that the number of your trial witnesses would overlap if we tried this —

MS. KELLY: Absolutely, Your Honor. Mr. Moreno and Mr. Mejia, the two co-owners of Majestic, would testify at both trials.

There is also another police officer who, while it may be true that they didn't know each other and talk outside of work, there is a common other police officer to both of them who both were aware was also referring cars and who both defendants were in constant communication with.

So there are at least three, maybe four witnesses that would testify at both trials, and that doesn't include a witness from Baltimore Police Department about the General Orders and some of those things that would absolutely go to both defendants.

The government submits — this is in our papers — except for the particulars of the substantive incidents for each defendant, the trial would look almost identical if they were separate.

THE COURT: Okay. Thank you.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. **CRIMINAL No. CCB-11-0122**

SAMUEL OCASIO, et al.

Defendants.

DEFENDANT OCASIO'S OBJECTIONS TO GOVERNMENT'S PROPOSED INSTRUCTIONS AND HIS REQUESTED INSTRUCTIONS

* * *

I.

DEFENDANT'S PRELIMINARY OBJECTIONS TO GOVERNMENT'S PROPOSED INSTRUCTIONS

Government Instruction 32 (Knowledge, Willfulness, Intent, Malice). The government requests Sand Instruction 7-16. The Supreme Court held in *Sandstrom v. Montana*, 442 U.S. 510 (1979) holding that a *presumption* that a person intends the ordinary consequences of his voluntary actions was impermissible, if it had so little as a "persuasion shifting effect." *Id.* at 519. While Government Instruction 32 is one step removed in that does not talk of a presumption (a distinction likely lost upon law jurors), its practical effect is to lower the government's burden of proof. Such an instruction is particularly inappropriate in the present case where the prosecution case will be quite direct.

Government Instruction 43 (Law Enforcement Witness). Defendant believes that his Requested Instruction 9 is superior to Sand Instruction 7-16, because it specifies that its admonition applies to all law enforcement witnesses, not just federal law enforcement witnesses.

Government Instruction 51 (Acts and Declarations of Co-Conspirators). While Government Instruction does recite Sand Instruction 19-9, Defendant submits that his Requested Instruction 11 is superior.

Government Instruction 57 (Third Element-Misuse of Official Position). Government Instruction 57 is Sand Instruction 50-22 dealing with the third element of a Hobbs Act extortion under color of official right. Defendant submits that his Requested Instruction 16 is superior because it recites the correct principle of law that one cannot use his official position to obtain an improper payment from one who is member of the conspiracy.

Government Instruction 58 (Wrongfully Obtained Consent of Giver). Government Instruction 58 recites Sand Instruction 50-23. Defendant's Requested Instruction 17 is a more accurate statement of the law because it fleshes out the alternative finding the jury can make, that is that the giver was making a payment for what he believed were legitimate services or services unrelated to the defendant's official position or misuse of that official position.

Government Instruction 59 (Fourth Element - Affecting Interstate Commerce). Government

Instruction 59 is a modification of Sand Instruction 50-24. Defendant's Requested Instruction 19 is Sand Instruction 50-24 without modification.

* * *

OCASIO'S REQUESTED INSTRUCTION 11

(Nature of Agreement; Mere Knowledge, Acquiescence, Association or Presence Insufficient to Prove Agreement)

Although a conspiratorial agreement may be inferred from circumstantial evidence, simple knowledge, approval or, or acquiescence in the object or purpose of a conspiracy, without an intention and agreement to accomplish the same, specific illegal objective is not sufficient to prove a conspiratorial agreement.

Because it is the agreement which is criminal in a conspiracy, the Government must prove what type of agreement existed as to the defendant and each person with whom it alleges he conspired. If there is no agreement or meeting of minds between conspirators as to the object, or essential nature of the illegal scheme or plan, there is no agreement. Any defendant who is not shown, beyond a reasonable doubt, to have agreed to the essential nature of the illegal scheme, must be acquitted of conspiracy.

The proof of a conspiracy fails if the purposes of two or more alleged conspirators are different, even though both intend to achieve an illegal goal.

See generally, Joseph S. McSorley, A Portable Guide to Federal Conspiracy Law, pp. 11 and 12

(ABA Criminal Justice Section, American Bar Ass'n) (1996).

As to first paragraph: *United States v. Zafiro*, 945 F.2d 881 (7th Cir. 1991), *aff'd*, 560 U.S. 534 (1993); *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1127 (1994) (civil conspiracy case); *United States v. Perlaza*, 818 F.2d 1354 (7th Cir.), *cert. denied*, 484 U.S. 861 (1987).

As to the second paragraph: *Blumental v. United States*, 332 U.S. 539, 537 (1947) (government must prove agreement on "essential nature of the plan"); *Krulevitch v. United States*, 336 U.S. 440, 448 (1949) (concurring) (must be "meeting of minds" to convict of conspiracy). As to third paragraph: *United States v. Giunta*, 925 F.2d 758 (4th Cir. 1991).

* * *

OCASIO'S REQUESTED INSTRUCTION 14

(Multiple Conspiracies)

In this case, the defendants contend that the government's proof fails to show the existence of only one overall conspiracy. Rather, they claim that the evidence shows, at most that there were actually several separate and independent conspiracies with various groups of members.

Whether there existed a single unlawful agreement, or many such agreements, or indeed, no agreement at all, is a fact for you, the jury, to determine in accordance with the instructions I am about to give you.

When two or more people join together to further one common unlawful design or purpose, a single

conspiracy exists. By way of contrast, multiple conspiracies exist when there are separate unlawful agreements to achieve distinct purposes.

(*If applicable*: Proof of several separate and independent conspiracies is not proof of the single, overall conspiracy charged in the indictment, unless one of the conspiracies proved happens to be the single conspiracy described in the indictment.)

You may find that there was a single conspiracy despite the fact that there were changes in either personnel (*if applicable*: by the termination, withdrawal, additions of new members), or activities or both, so long as you find that some of the co-conspirators continued to act for the entire duration of the conspiracy for the purpose(s) charged in the indictment. The fact that the members or a conspiracy are not always identical does not necessarily imply that separate conspiracies exist.

On the other hand, if you find that the conspiracy charged in the indictment did not exist, you cannot find any defendant guilty of the single conspiracy charged in the indictment. This is so even if you find that some conspiracy other than the one charged in this indictment, even though the purposes of both conspiracies may have been the same and even though there may have been some overlap in membership.

Similarly, if you find that the particular defendant was a member of another conspiracy, and not the one charged in the indictment, then you must acquit the defendant of the conspiracy charged.

Therefore, what you must do is determine whether the conspiracy charged in the indictment existed. If it did, you then must determine the nature of the conspiracy and who were its members.

Sand Instruction 19-5

OCASIO'S REQUESTED INSTRUCTION 15

(Conspiracy - Intended Giver
Cannot be a Coconspirator)

In order to convict a defendant of conspiracy to commit extortion under color of official right, the government must prove beyond a reasonable doubt that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy. Therefore if you find that the only person or persons from whom a defendant conspired to obtain money by extortion under color of official right was another person or other persons who were also members of the conspiracy, then you must find the defendant not guilty of the conspiracy.

To put the matter more precisely, if you determine that a defendant participated in a conspiracy to extort money under color of official right only from Alexis Moreno, Edwin Mejia and/or the company Majestic you must acquit the defendant. That is true even if the ultimate source of the money or property supposedly extorted from Moreno, Mejia or Majestic was a third party such as an insurance company for the owner of an automobile which had been involved in an accident or vandalized.

United States v. Brock, 501 F.3d 762, 767 (6th Cir. 2007) (Hobbs Act conspirators must have formed an

agreement "to obtain property *from someone outside the conspiracy*." (emphasis added)); 18 U.S.C. § 1951(b)(2) (Hobbs Act extortion defined as "the obtaining of property *of another*" (emphasis added)); *cf United States v. Medford*, __ F.3d __, Case No. 08-5030 (4th Cir., Nov. 7, 2011) (appellants' argument raised for first time on appeal that conviction of Hobbs Act conspiracy should be reversed because money was obtained from coconspirators rejected under plain error analysis because indictment did not charge that the "givers" were Hobbs Act conspirators); *but see United States v. Currie*, Crim. No. RDB-10-0352 (D. Md., Aug. 5, 2011).

OCASIO'S REQUESTED INSTRUCTION 16

(Substantive Count -Third Element-Misuse of Official Position)

The third element which the government must prove beyond a reasonable doubt to convict a defendant of the individual illegal payments charged in Counts 2 through 7 of the Superseding Indictment is that the defendant used the authority of his office or position to obtain the money, goods or services. That is, you must decide whether the defendant represented himself as capable of doing something, or of refusing to do something because of his official position.

To satisfy this element, the government must prove beyond a reasonable doubt the defendant obtained a payment from another. that is, from a person or entity that is not a coconspirator, to which he was not entitled, knowing that the payment was made in return for official acts rather than

voluntarily or unrelated to the defendant's office. The defendant need not have affirmatively induced the payments by his actions, but he must have known that the payment was offered in exchange for a specific exercise of his powers. You do not have to determine whether the defendant could or did actually perform the service, or whether he actually had a duty to do so.

Sand Instruction 50-22 (modified by addition of underscored language); *see United States v. Brock*, 501 F.3d 762, 767 (6th Cir. 2007), and authorities cited with respect to Defendant's Requested Instruction 15, immediately above.

OCASIO'S REQUESTED INSTRUCTION 17

(Wrongfully Obtained Consent of Giver)

If you decide that the defendant was given money, goods or services not due the office he represents, you must then decide whether the defendant used the authority of his office or position to obtain the money, goods or services. The focus of your inquiry is whether the money, goods or services were given to the defendant because of the defendant's misuse of his position. The government must prove beyond a reasonable doubt that these items were given to the defendant in connection with his power and authority as a public official. The giver may have initiated this exchange and the parties may have been on friendly terms. These are factors to consider in deciding whether the giver gave the payments because he believed the defendant would use his office for facts not properly related to his official duty, or whether, instead, the giver was

making a voluntary contribution, or instead the giver was making a payment for what the giver believed were legitimate services or services unrelated to the defendant's official position or misuse of that official position.

Unless you decide, beyond a reasonable doubt, that the defendant knew the giver's consent was wrongfully obtained—that is, that the money goods or services were given in connection with the defendant's misuse of his official position rather than being given voluntarily—you cannot convict the defendant.

Sand Instruction 50-23 (modified by inclusion of underscored language)

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. **CRIMINAL No.**

SAMUEL OCASIO, et al. **CCB-11-0122**

Defendants.

GOVERNMENT'S MOTION IN LIMINE

The United States of America, by its undersigned attorneys, herein moves *in limine* for the entry of an Order precluding the defense from asserting or suggesting in any jury address that the government is required to prove that the defendants obtained money or property from a non-member of the charged conspiracy in order to prove the charges in this case. As grounds for this motion, the government states as follows:

INTRODUCTION

The defendants are charged in a Superseding Indictment with conspiracy in violation of 18 U.S.C. Section 371 and with substantive counts of Hobbs Act extortion under color of official right in violation of 18 U.S.C. Section 1951(a). The trial is scheduled to commence on Monday, February 13, 2012.

Earlier this week, defendant Ocasio submitted a number of proposed jury instructions. The government expects to make its objections to many of those proposed instructions at the time of the charge conference, in accordance with the standard practice in this Court. The defendant's Requested

Instructions 15 and 16, however, suggest that the defendant may assert a legally incorrect interpretation of the elements of conspiracy and the Hobbs Act as a defense at trial. Any such inaccurate assertion of the applicable legal standards would serve only to confuse and mislead the jury during trial. Accordingly, the government moves *in limine* to exclude argument in any jury address, including opening and closing statements, that the government must prove that the defendants conspired to obtain money from a person or persons who were not also members of the charged conspiracy.

ARGUMENT

Relying on a lone Sixth Circuit case that is at odds with both Supreme Court and Fourth Circuit precedent, defendant Ocasio proposes in his Requested Instructions 15 and 16 that this Court instruct the jury that it must find that the defendants obtained money or property from a person who was not a member of the charged conspiracy in order to convict the defendants for violating the Hobbs Act or for conspiring to do so. Those instructions misstate the law and should not be given to the jury nor should the defense be permitted to suggest to the jury that it must make any such finding in determining whether the government has met its burden of proof at trial.

The case upon which the defendant relies is *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007). In that decision, the Sixth Circuit held that in order to be guilty of conspiracy to commit extortion under the Hobbs Act, the alleged conspirators must have formed an agreement to obtain property from an

individual or entity outside the Hobbs Act conspiracy. 501 F.3d 762, 767 (6th Cir. 2007). This decision is not controlling for several reasons.

First, as several other courts have already recognized in expressly refusing to follow *Brock*, the Sixth Circuit's ruling is inconsistent with the holding in *Evans v. United States*, 504 U.S. 255, 257 (1992). *See, e.g.*, *United States v. Kott*, 625 F Supp. 2d 854, 856-58 (D. Alaska 2007) (Court declined to follow Brock in case where conspiracy charged under Section 371 to commit extortion under color of official right and bribery involving Alaskan politicians on ground that Brock was inconsistent with Evans and "conflicts with precedent in at least four other circuits [including the Fourth Circuit]"). In *Evans*, the Supreme Court specifically ruled that "[i]n the case of the public official [t]he [Hobbs Act] statute merely requires of the public official that he obtain 'property from another, with his consent, under color of official right" and that "the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 265, 268. There simply is no requirement that the payor in the extortion scheme be a person outside of the charged conspiracy.

Notably, Judge Bennett recently rejected an identical argument based on the *Brock* decision in *United States v. Currie*, 2011 WL 3439942 (D. Md. Aug. 5, 2011). In *Currie*, as in the instant case, the defendants were charged with conspiracy to violate the Hobbs Act under 18 U.S.C. Section 371 and with a substantive Hobbs Act violation. Citing *Brock*, the

defendants moved to dismiss both the Hobbs Act count and the Section 371 conspiracy count on the ground that the indictment failed to allege that the extortionate payments were made by a non-member of the charged conspiracy. Judge Bennett found that the *Brock* decision is inconsistent with the Supreme Court's holding in *Evans* that public officials can conspire with bribe payors to extort property from payors when the payments are in return for official action. As a result, the Court denied the motion to dismiss, "reject[ing] Defendants' argument that a person cannot be found guilty of extortion, aiding and abetting extortion, or conspiracy to do the same, if the extorted party is named as a co-conspirator." *Id.* at *10.

Second, the Fourth Circuit has not adopted the *Brock* rationale, and the defendant's reliance on the recent decision in *United States v. Medford*, 661 F.3d 746 (4th Cir. 2011), is misplaced. In that case, the defendant apparently raised a similar *Brock* argument, but the Court never even reached the issue, finding instead that the defendant's legal argument "suffers from a false premise, namely that all the persons and entities from whom [the defendant] and his co-conspirators obtained property were parties to the conspiracy." *Id.* at 754.[1]

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[1] The defendant in *Medford* was charged with conspiracy to commit extortion pursuant to 18 U.S.C. § 1951, which is not the offense charged in this case. Likewise, the defendants in *Brock* were not charged with conspiracy pursuant to 18 U.S.C. § 371, nor were they charged with substantive Hobbs Act violations, as the defendants are charged here.

United States v. Spitler, 800 F.2d 1267 (1986), sets forth the current state of the law in the Fourth Circuit. That decision firmly establishes that there is no requirement that the government prove that money or property be obtained from a non-conspirator in order for there to be a substantive violation of the Hobbs Act or a conspiracy to commit such a violation under 18 U.S.C. Section 371. In *Spitler*, the Court affirmed a conviction for aiding and abetting and conspiracy to violate the Hobbs Act where the defendant worked for the company that was the victim of an extortion scheme. The government official in that case demanded payment from the defendant and his company in exchange for the awarding of government contracts. The defendant argued he was the victim of the Hobbs Act violations since his company had been "shaken down" by the public official and could not, therefore, be convicted for aiding and abetting the extortion or conspiring to commit it. The Fourth Circuit rejected that argument, holding that "[w]e affirm [the defendant's] conviction of aiding and abetting and conspiracy to commit extortion because [the defendant] cannot be deemed a mere extortion victim whose conduct, under the defendants' argument, Congress chose not to criminalize under the statutes proscribing aiding and abetting and conspiracy." *Id.* at 1275.

In short, defendant Ocasio's Requested Instructions 15 and 16 are legally incorrect. Defense counsel therefore should be precluded from suggesting or arguing to the jury that the government must show that the extortionate payments were made by a person outside of the charged conspiracy in order for it to meet its burden

of proof on the charged offenses. Any such argument or suggestion would only serve to confuse and mislead the jury.

CONCLUSION

For the foregoing reasons, the government respectfully requests that this honorable Court grant its Motion *in Limine*.

Respectfully submitted,

/s/

United States Attorney

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. **CRIMINAL No. CCB-11-0122**

SAMUEL OCASIO, et al.

Defendants.

JURY TRIAL DAY 1

Before: The Honorable Catherine C. Blake
United States District Judge

Baltimore, Maryland

February 13, 2012

* * *

[17–22]

[MS. KELLY:]

But although they took that oath, and they agreed to be police officers, they accepted both the privilege and obligation of being a police officer, they both eventually succumb to greed, and they began using their position, that privilege of being Baltimore police officers, to enrich themselves by getting cash kickbacks, to convince accident victims to have their cars towed and repaired by Majestic Auto Body.

And when they did, they joined a growing body of police officers who were also doing the same, and that's all this trial is about.

My name is Tonya Kelly, and together with Ms. Gavin and Michelle Wicker of the United States

Attorney's Office, we are going to be presenting this case to you.

Also seated with us is Special Agent Rob Guynn and Detective Matthew Smith of the Baltimore Police Department.

We are here to provide you with all of the evidence that you need to find beyond a reasonable doubt that both Kelvin Manrich and Samuel Ocasio are guilty of conspiracy to commit extortion under color of official right, and for substantive counts of extortion under color of official right.

Now I warn you, do not be distracted by the word extortion. It doesn't mean in this case maybe what you brought in the door with you you think it means. Like Judge Blake just told you, all it means is unlawfully obtaining money under color of official right from Majestic.

It doesn't mean force. It doesn't mean against someone's will. Like Judge Blake said, it can be by consent, and in this case, Majestic absolutely consented.

They wanted nothing more than for Kelvin Manrich and Samuel Ocasio to be successful in getting cars to Majestic. Because what does that mean for them? More money. How is an auto repair shop going to make money? Get cars, fix them, bill insurance companies, and get more cars.

This kickback scheme was actually very, very simple. Majestic Auto Body is an auto repair shop that is located in Rosedale, Maryland. And for any of

you that aren't familiar with the city, it's literally steps from the city line.

The Northeast District of Baltimore City is just next to Majestic Auto Body in Rosedale, and Kelvin Manrich was assigned to the Northeast District. So every time Mr. Manrich got an accident, it was just minutes from Majestic Auto Body.

In approximately 2008, the evidence will show you that Alex Moreno and his brother, Edwin Mejia, were running Majestic Auto Body, and they wanted more cars, because more cars means money.

Alex Moreno met a Baltimore police officer named Jhonn Corona. Jhonn Corona started to take — strike that. Excuse me.

Alex Moreno started to pay cash kickbacks to Jhonn Corona to refer cars to him, and it was honestly so easy for everybody that Jhonn Corona told an officer, who told an officer, who told an officer, and told an officer, and eventually we stand here because these two officers were told and started to get kickbacks. That's how these two get here.

I'm going to tell you a little bit about the general pattern of the scheme. As I said, it's awfully simple, so simple that it is easily shown by just a few pictures.

This is how it works. I get into an accident and I call 911. I need help. So the dispatcher from Baltimore City sends a police officer, in this case that we are talking about here, Kelvin Manrich and Samuel Ocasio.

What do they do? They go to the scene. They see if there are cars there that need to be repaired, and what do they do? They call Alex Moreno or Edwin Mejia of Majestic and say hey, can you get a tow truck over here? Come get this car.

Alex Moreno and Edwin Mejia either take a tow truck there themselves or they send somebody they contract with, and they go pick up the car, and it ends up at Majestic.

And here's where it gets real simple. Majestic fixes it, sometimes adds a little bit of damage, because they've got to cover this kickback. Samuel Ocasio and Kelvin Manrich go the next day to pick up their $300 cash. Everyone wins, right?

That's why kickback schemes are successful. Everybody gets what they want. Majestic gets cars to fix, and Samuel Ocasio and Kelvin Manrich get money they shouldn't have, and that's what they are charged with doing. They are charged with knowingly taking cash kickbacks to enrich themselves and to benefit Majestic.

Now this is a really important point. This crime is only a crime if they are being paid by Majestic because of their position as police officers.

Think. Why would Majestic want to pay police officers? There are two reasons, trust and access.

I'm going to start with trust. What's the first set of numbers we learn as children? 911, because that's what we call when we are in trouble.

We call 911 if we are robbed. We call 911 if there's a fire. We call 911 if we get into a car

accident. We call 911 because the police are supposed to come and help us.

* * *

[32–38]

[MR. CROWE:]

May it please the Court, ladies and gentlemen of the jury. We were introduced briefly maybe about three hours or so ago. My name is Tom Crowe. I'm a lawyer. I'm a sole practitioner. That means I'm in practice by myself. I have an office here in Baltimore City.

For the next couple of weeks I am going to be with you in this trial, and I am going to be representing, indeed, I have the honor to be representing, Samuel Ocasio in this case, who I will tell you is a brave and an honest Baltimore City police officer.

He's a 36-year-old father of two. He and his wife live in Harford County, Maryland. He was born in Puerto Rico, and for a number of years he served honorably on the San Juan Police Department in Puerto Rico. I think most of you probably know that San Juan is the capital of Puerto Rico.

Approximately five years ago, about 2007, as Ms. Kelly told you, the Baltimore City Police Department decided it had a problem, in that there was a growing population of Spanish-speaking people in the city, and they didn't have enough officers who could speak Spanish.

So at that point there was a recruitment drive down in Puerto Rico. My client was interviewed in

Puerto Rico. He was brought up here to Baltimore for a period of four days for a series of tests.

They did an extensive background investigation in order to assure that the person they were getting was honest, respected, a good police officers, somebody essentially with no skeletons in his closet.

He was then accepted into the police department in 2007, and he came to Baltimore City in 2008. At which time, he entered the Baltimore Police Academy.

At that time, he went through that rigorous program, which Ms. Kelly has described to you. In addition to that, he undertook field training, which she has described to you. He graduated, and he was assigned to the Southern District.

Now for those of you who aren't familiar with Baltimore City, and I guess probably for all of you who aren't familiar with the various police districts in the city, the Southern District is located not terribly far from this courthouse. The police headquarters is over in Cherry Hill. I think those of you who are from this area probably know that that's a pretty dangerous place to work.

Mr. Ocasio, at about this time, also brought his wife and children from Puerto Rico. They moved into Harford County.

You will learn during the course of this trial that Mr. Ocasio is a very respected and, in fact, a very loved member of the Hispanic community up in Harford County, and he is particularly active in the Hispanic church, the Hispanic Pentecostal Church

that he attends up there. But that's really not at the heart of this case.

Not only is Cherry Hill dangerous, but as I expect you will appreciate, the most dangerous time to be a police officer is this midnight shift we have been hearing about.

For the period of time that Mr. Ocasio was in the Southern District, he was assigned to the Southern District on this very dangerous shift, which occupied him between about 11 o'clock in the evening until 7 o'clock in the morning. It is not one of those shifts which people fight for. It is not one of those shifts which people voluntarily choose. It is the type of shift to which a new officer is very often assigned.

Now you will also learn that my client has received commendations for brave actions that he has taken. He has been injured in the line of duty in car accidents, which are not his problem. In fact, he received a commendation as recently, believe it or not, December of last year.

That has some significance because my client's police career effectively ended in February of last year, pretty close to a year to the day right now. At that point, he was suspended, and he is still on that suspension.

Let's not kid ourselves, whatever the result of this trial here today, he is not going to be rehired by the Baltimore City Police Department, and he likely has no career anyplace in law enforcement as well.

Why did he get here? He is here not really because of all of these wiretapped conversations that

you have been hearing about or these pole camera shots at Majestic. He is here because two people have made false allegations about him. One is Alex Moreno and the other is Moreno's brother, who is known as Edwin Mejia.

Ms. Kelly really didn't spend an awful lot of time talking about them. Indeed, if they were my witnesses, I don't think I would spend much time talking about them either.

I mean with the exception of possibly murderers and drug dealers, Mr. Moreno is about as low down and despicable a person as you are likely to meet in your entire lifetime. He corrupted a great number of Baltimore City police officers. We don't deny that. He did not corrupt my client, Samuel Ocasio.

But Alex Moreno has been something of a cancer in the city, and certainly, I think the police department regards him as something as a cancer also.

Ms. Kelly also didn't tell you that during the course of the investigation, Mr. Moreno has made a number of statements about Mr. Ocasio, which we think are demonstrably false. If they don't bring them up in their examination of Mr. Moreno, we are going to do it as well.

What did Moreno do? He paid police officers when he clearly shouldn't have paid police officers. He brought cars into —

He had a number of police officers — again, not Mr. Ocasio. The government won't even allege this — write out false police reports, saying that there was

damage to the cars when there wasn't. The reason for that is so when the insurance company looks at the original police report, it corresponds and matches the damage which Moreno and people at his shop are going to inflict on the cars.

Maybe what's one of his only honest statements, Mr. Moreno said that Mr. Ocasio is not aware that that was something that they were doing.

So what Moreno was doing, he was corrupting police officers. He was cheating insurance companies. Quite honestly, he is making all of our insurance rates go up for things such as this, and people in that industry are, very understandably, a little bit concerned.

Now I am in somewhat of an unusual position. I am standing here between the entirety, and I am basically interposed between the entire might of the United States government and the Baltimore Police Department and my single client, Samuel Ocasio.

But in a sense, I have a lit bit of company, and the company I have are the people who are neutrals, the people who are going to be judging this case.

There is, of course, Judge Blake who has told you that she says what the law is. You may disagree with her, I may disagree with her, the prosecution may disagree with her, but what she says the law is is the law in this case.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

SAMUEL OCASIO, et al.

Defendants.

CRIMINAL No. CCB-11-0122

JURY TRIAL DAY 2

Before: The Honorable Catherine C. Blake
United States District Judge

Baltimore, Maryland

February 14, 2012

* * *

[28–30]

[DIRECT EXAMINATION OF
CHAD ROBERT ELLIS]

BY MS. GAVIN:

Q Detective sergeant, it might be easier if you come down. I don't know. You can touch the screen I think as well. If you want to come down to talk about this a little bit. What is this map?

A This map is a rendering of the City of Baltimore and it is divided into the nine police districts.

Q So there are nine districts of the city, correct?

A Yes.

Q What are the names of the districts?

A The districts are — I'm going to do this in a two-part answer. The districts are sequentially numbered 1 through 9. I will start at 1. One is the Central. Two is the Southeast. Three is the Eastern. Four is the Northeast. Five is the Northern, 6, Northwest, 7, the Western, 8, Southwest, 9, Southern.

Q So when a police officer —

You talked about, with Officers Ocasio and Manrich, their assignments. Officer Manrich is assigned where?

A Northeast.

Q Then Officer Ocasio was assigned where?

A Southern, Southern District.

Q On the map there are sort of what almost looks like little mini states. What are those with the numbers?

A Each district — the easiest way to explain this is each district resembles its own police department, although they all communicate, and they all one. But each district is divided into sectors and then posts.

So the Southwest District, for example, has — well, let me use the Northwest. The Northwest District has three sectors, and each sector has four to five posts.

So on any given day, if I were today the day shift, 7 to 3, if I was to work 35 post in the Northwest, I would be 6 Baker 35. Baker is the delineation or identifier for the day shift.

Adam is the midnight; Baker, day; Charlie or C for night shift.

Q So when dispatched emergency calls, if a call goes out to you on that shift, and you were assigned to that post sector, that would be — would it be your call number?

A Yes, it would be your call number. For any given day, if you're in patrol, unless you're assigned a post, a permanent post, any given day, you could be, if you're in this district, for example, you could be 611 or you could be 634, or you could even be 691.

I don't want to confuse you, but there are two other — usually in each district there are two other odd post designations which are lagging the numbers. Usually they are 91 and 92.

* * *

[94–103]

[CROSS-EXAMINATION OF
CHAD ROBERT ELLIS]

[BY MR. CROWE:]

Q In what instances would an officer be allowed to use phone number two, the police-issued phone for non-police business?

A Honestly, there is a General Order regarding that, and I believe you are prohibited from long distance use. It's not to be your sole source of communication outside of work.

Q There is certainly no restriction on making calls for non-police business on a personal cell phone which you have with you while you are on duty, is there?

A No.

Q As I understand from this data sheet, Mr. Ocasio was hired in October of 2007; is that correct?

A Hired date, October 24, 2007.

Q He was actually assigned on July 31, 2008. Do I understand that that assignment date is after he completed his five or ten-day internship, and he came on board as an active police officer in the Southern District?

A Five or ten days, no, internship?

Q The period of time when he was riding around with another officer.

A Largely, that's a ten-week field training after the police academy.

Q Does this also show that Mr. Ocasio, on the second page, that he has a special skill and that he is fluent in Spanish?

A Yes.

Q I would next like to turn to Government's Exhibit 126. Do you have that in front of you?

A I do not.

MR. CROWE: Thank you very much. I appreciate that.

Q As I understand it, this is a document called Personnel Service Record. Is that correct?

A Yes.

Q That is a file which is maintained, which the Baltimore Police Department maintains for each of its officers. Is that right also?

A Actually, yes, each of its members, sworn and civilian.

Q You used the word sworn officer before, and the members of the jury may not be familiar with the term. But that is essentially somebody with police powers, the power to arrest; is that correct?

A Yes.

Q Does this report also indicate that prior to joining the Baltimore Police Department, my client served with the San Juan, Puerto Rico Police Department for a period of nine years?

A Yes.

Q Did you testify earlier this morning that the Baltimore Police Department conducts a very thorough background investigation into all of its applicants before it finally hires any one of them?

A There is a background investigation, yes.

Q Is it a thorough background investigation?

A Yes.

Q Would you expect that Mr. Ocasio passed the thorough background investigation which the Department conducted?

MS. GAVIN: Objection, Your Honor.

THE COURT: Overruled. If he knows.

A I would glean that he did, as he was hired.

Q You would be shocked if he had not, would you not?

A Yes.

Q Now the entire Personnel Service Record is in fact much more extensive than what we see here, is it not?

A Yes, it is.

Q It's a file in which Mr. Ocasio's case is probably two or three inches thick; is that right?

A Yes.

Q Would I be correct that you reviewed the entire personnel file before you came into court?

A I have reviewed Ocasio's file that the U.S. Attorney has in its possession, yes.

Q Indeed, are there commendations that Mr. Ocasio received for exemplary, that is, noteworthy performance as a police officer?

A Yes.

Q I'm going to put on the screen what is — thank you very much — Ocasio Exhibit 1. Is that in fact a Letter of Commendation from the Baltimore Police Department?

(Defendant Ocasio Exhibit Number 1 was received.)

A Could you —

Q Yes.

A There you go. Yes, it is.

Q Would you just read the two paragraphs into the record, please?

A Yes. Please accept my compliments for the recent arrest of Michael Singleton on December 22, 2008, after three gunshots were heard in the area of Lemon

and Schroeder Streets. Not only was the suspect arrested, a loaded Jimenez Arms semiautomatic handgun was recovered. Through your enforcement efforts and team work, another violent offender was removed from the streets of Baltimore.

On behalf of the Baltimore Police Department, I thank you for your commitment and professionalism. Please up the good work in making the streets of Baltimore a much safer place to live, work and visit. Sincerely, John P Skinner, Colonel, Chief, Patrol.

Q The Patrol Division is the one to which most of the uniform members that we see on the street belong to; is that correct?

A Correct.

Q Probably the largest, probably the largest division within the Department in terms of manpower?

A Yes.

Q I believe Colonel Skinner is still with the Department; is that right?

A Colonel Skinner is presently the Administrative Deputy Commissioner.

Q Does that mean that he is the second ranking officer in the Department?

A Third.

Q The third ranking officer in the Department. Next I would like to put up what has been marked as Ocasio Exhibit 2. Do you see that this is a second letter from Colonel Skinner.

(Defendant Ocasio Exhibit Number 2 was received.)

A Yes.

Q It's dated May 5, 2010; is that correct?

A Yes.

Q Could you just read the three paragraphs of that short letter into the record?

A I would like to take this opportunity to thank you for your outstanding work and dedication. On April 17, 2010, you responded to 2325 Annapolis Road for a burglary in progress. After a foot pursuit, you arrested Brandon Carter and Jerrel Taylor and recovered a .22 caliber Browning semiautomatic handgun.

As you know, the arrest and prosecution of violent gun offenders is a key component of Baltimore's crime reduction strategy. This strategy will only be successful through the hard work and determination of officers like you.

On behalf of the Baltimore Police Department, thank you again for a job well done.

Q This is a letter which references an April 17, 2010 incident. Is that correct?

A Correct.

Q I'm going to show you what has been marked as Ocasio Exhibit 3. It's a December 5, 2011 letter from I believe the police commissioner or Commissioner Bealefeld. Is that correct?

(Defendant Ocasio's Exhibit Number 3 was received.)

A Yes.

Q Just to get our date straight, my understanding is that Mr. Ocasio was suspended either on February 23rd or February 24th of 2011. Is that your recollection also?

A He was suspended on the 23rd, yes, pending a hearing on the 24th. Correct.

Q At which time, they suspended him without pay?

A Yes.

Q That has been his status since that time. This letter is one which was written a good number of months, I guess probably about eight months, actually closer to, you know, ten and a half, 12, ten and a half or 11 months after he was suspended without pay. Is that correct?

A Yes.

Q The letter refers, does it not, to the same April 17, 2010 service as Colonel Skinner's letter, which was Ocasio Exhibit 2; is that right?

A Yes.

Q This letter is a little bit longer, but I just wonder if you would read that into the record?

A It is always a pleasure for me to congratulate members of the Department for their contributions to the safety and well-being of the citizens we serve. Such exemplary service demonstrates a level of dedication and commitment that is admirable and deserving of official recognition.

The Meritorious Service Board has recently reviewed a summary of your performance on April 17, 2010, where you responded to an armed burglary

call where a woman and her child were in danger when three armed suspects entered the home through a window.

For your exemplary attention to duty, the Board recommends that you receive a commendatory letter. I fully concur with their recommendation as you are truly deserving of the recognition which this letter conveys.

I encourage you to continue to display such professional conduct in your service to the City of Baltimore and our Department. This letter will become part of your personnel record.

Q That letter is signed by the commissioner himself, Commissioner Bealefeld, who is the number one person in the Department. Is that right?

A Yes.

Q What is the Meritorious Service Board which the commissioner refers to in his letter?

A The Meritorious Service Board is a panel that reviews the officer's performance that goes above and beyond what is expected as a day-to-day action of a police officer.

Q Approximately how many people are on that board?

A I believe it's three.

Q Indeed, the fact that the Meritorious Service Board approved that commendation indicates, at least in its position, that Mr. Ocasio's action on that day went above and beyond the call of duty?

A Yes.

Q Is it in fact true, sir, that Mr. Ocasio has no file in Internal Investigations?

A I'm unaware of one.

Q I would like you to take a look at a paper we got from the U.S. Attorney's Office, which I have marked as Defendant's Exhibit 4. I'm sorry. Are you able to read that?

(Defendant Ocasio's Exhibit Number 4 was received.)

A Yes. This is a snapshot of Ocasio's activity or history within Internal Investigations Division.

Q Does it say incident count, zero.

A Yes.

* * *

[114–116]

[REDIRECT OF
CHAD ROBERT ELLIS]

BY MS. GAVIN:

Q Detective Sergeant Ellis, you were asked on cross-examination about a Letter of Commendation that was dated in December of 2011, Defendant's Exhibit Number 3. Do you recall being asked about that letter?

A I do.

Q That letter referred to an incident that had happened in April of 2010. Isn't that right?

A Correct.

Q So it's like an 18-month time frame, is that correct —

A Yes.

Q — between the two events?

A Yes.

Q You were asked questions about — I believe Mr. Crowe asked you whether it was true that Commissioner Bealefeld actually personally signed that letter. Do you recall being asked that question?

A Yes.

Q Do you know whether Commissioner Bealefeld signed that letter or ever saw that letter?

A Those letters are auto signature.

Q So it's a stamp, correct?

A Yes.

Q Who issued those letters with the stamp?

A The commissioner's office.

Q What is the Merit Board that you mentioned? What does that do?

A The Meritorious Service Board is a board that determines whether or not additional, or a commendation or a decoration would be allowed for an officer based on his or her efforts in the execution of their duty, if they went above or beyond.

* * *

[130–146]

[DIRECT EXAMINATION OF
HERNAN ALEXIS MEJIA MORENO]

[BY MS. KELLY:]

Q At that point did Edwin have experience in repairing cars?

A Well, he had experience in manage a business shop.

Q He wasn't actually the person who was doing the painting and repairing fenders, for instance?

A No.

Q Was this in approximately June of 2006?

A Yes.

Q What was the name of the company that you started?

A Majestic Collision Center.

Q When Majestic Collision Center started, was it an auto body repair shop or something different?

A When we started, it was just a mechanical shop.

Q I'm not that great with cars. What's the difference between the body repair and mechanic shop?

A The mechanic shop, it's a lot of grease involved. Cars just come to repair, like oil changes, change axles. Then body work is just fenders. It's pretty much accident cars.

Q Did at some point you change your focus of Majestic from mechanic work to body work?

A Yes. That was the idea from the beginning, to do body work. But the place that we rent, it wasn't zoned to do body work. So we start as a mechanical shop until we changed the place for the zoning to do body work, legally do body work.

Q Where was the shop that you ultimately ended up in that did body work? What was the address?

A 7404 Philadelphia Road.

Q Did you change the name from Majestic Collision Center?

A No. It keeps the same.

Q Oh, it has been Majestic Collision Center?

A It's Majestic Collision Center.

Q I am going to show you what has been marked as Exhibit 41. Do you recognize this picture?

(Government's Exhibit Number 41 was received.)

A Yes.

Q What is it?

A It's the shop that we used to run.

Q So even though it's technically named Majestic Collision Center, the building reads Majestic Body Shop. Is that right?

A Yes.

Q It's the same place.

A The same place.

Q You see this street that is right in front, that is running right in front of the shop?

A Yes.

Q What road is that?

A That's Philadelphia Road.

Q If you see the building sort of in the bottom right, is that the door into the building?

A Which door? I'm sorry.

Q To the right of the building.

A Oh, yes, that's the door to the building. That's the main, the office door.

Q Over on the left, it sort of looks like a garage, what is that?

A That's one of the further bay's door. That place in there is where we were doing the painting and some body work.

Q So is that where cars would go in to get fixed?

A Yes.

Q Then you can see on the picture, it appears that over to the right of the entryway door is a fence with a bunch of cars in the back.

A Right.

Q Why do you have a fence up and cars in the back?

A Well, that's the cars that we were in the process of to fix it or cars that were just left there by customers.

Q The cars in front, is that where customers would park when they would come in?

A Yes.

Q Over on the right, do you see the front of what appears to be a tow truck?

A Yes.

Q Do you know whose tow truck that is?

A That's Mario's Tow Truck.

Q Mario's Tow Truck?

A Yes.

Q Now do you live ne[ar] 7404 Philadelphia Road?

A Yes.

Q How far would you say?

A Like two minutes away.

Q Now I'm going to show you what has been marked as Exhibit 84.

(Government's Exhibit Number 84 was received.)

MS. KELLY: Is this okay, Your Honor?

THE COURT: That's fine.

BY MS. KELLY:

Q Can you see this, Mr. Moreno?

A Yes.

Q Do you see here where it says Majestic Auto Body, 7404 Philadelphia Road?

A Right.

Q Do you see here where your house is?

A Yes.

Q Is this just —

A Right.

Q Are you familiar with where Baltimore City is?

A Yes.

Q So if Majestic is here, is the city on the left side of Majestic or the right side?

A If I'm sitting, it's on the left-hand side.

Q So basically all of this is the city?

A Right.

Q How close, if you know, is Majestic to the city line?

A It's a minute away from the city line, yes.

Q So your shop is just right outside Baltimore City?

A Just right outside, yeah.

Q Now were you and Edwin the owners of Majestic?

A Yes.

Q Were you equal owners?

A Considered equal owners, yeah. It was like 50 and 40, but it was equal owners.

Q Did you own the building that Majestic was in?

A No. We rent the building.

Q Did you pay rent to rent it?

A Yes.

Q Did there come a time when you had too many cars to fit in the location at 7404 Philadelphia Road?

A Yes.

Q And what did you do?

A It's a liquor store with a parking spot right in front of Majestic. So we used to park the cars there.

Q When they wouldn't fit in the back anymore?

A When they wouldn't fit in the back anymore, yes.

Q Did there come a time when you rented additional bays anywhere where you did work?

A Yeah. It's another shop. It's just a mechanical shop down the street towards the city. It's like a half a minute walking, and we rent the place for quite a bit.

Q What would you do in those bays?

A It was just one bay. You can fit, I want to say, four or five cars, and we were fixing the cars there too.

Q Out of you and Edwin, which one of you were responsible for managing Majestic?

A It was more him than I.

Q Who would be responsible, who of the two of you were responsible for personnel decisions, like hiring people or firing people?

A It was more Edwin because he had a little more experience about what kind of person we will hire.

Q What did you do? What was your job?

A My job was responsible to bring vehicles, bring the clientele to the shop.

Q I'm sorry, bring the clientele to the shop?

A Yes.

Q Who is Milton Cisneras?

A He is my cousin.

Q And did he have any role at Majestic?

A He was sort of like the manager of Majestic. He was the person who worked in the office all the time, answering phones, ordering parts, and stuff like that.

Q Do you know somebody by the name of Leonel Sarmiento?

A Yes.

Q Who is he?

A He worked at Majestic as a mechanic. When I say mechanic, he is the person who fixed oil changes, change tires. It was not like body work. It was just mechanical work.

Q So did he work at Majestic when you were only doing body work?

A No. He worked at Majestic when we were just doing mechanical work.

Q How many full-time employees beside yourself and Edwin did Majestic have?

A Full-time employees, we have about four or six, around there.

Q Were all of your employees legally inside the United States?

A No.

Q Were some of them illegally in the United States?

A Yes.

Q Did you always pay your employees legally, and provide them with W-2s?

A No. It was just some of them and some not.

Q Would you pay some of them in cash?

A Yes.

Q At some point, Mr. Moreno, did you, yourself, apply to the Baltimore Police Department?

A Yes.

Q And why did you do?

A I always wanted to become an officer or be in the Army since I was a kid.

Q And did you ever become a Baltimore police officer?

A No.

Q I'm going to turn your attention to the body repair process. Okay?

A Okay.

Q Once a car gets to the shop for auto repairs or body repairs, what is the first thing that needs to get done?

A When the car comes to the shop, the first thing that needs to be done is we've got to wait for an adjuster to come to the shop so the adjuster writes an estimate.

Q Let me stop you there. Who does an adjuster work for?

A The adjuster works for the insurance company.

Q So a car gets a dent. Just imagine it has a big bump on the fender. You need to wait for an adjuster to come from the insurance company and write an estimate?

A Yes.

Q What's an estimate?

A An estimate is paperwork that an adjuster writes on it what kind of damage, and makes a decision whether the car needs to be fixed or not, or what kind of part needs to be replaced.

Q Does an estimate usually have a dollar value to it?

A Yes.

Q What does the dollar value represent?

A That I'm not sure. I know what an estimate is, but my brother was more in charge about doing that than I.

Q When the insurance company paid Majestic Auto Body to fix the car, how did they know how much money to pay the auto repair shop, your shop?

A Well, for the parts that need to be replaced, they would pay by the pain, by labor, if the part needs to be fixed or needs to be replaced.

Q The cost of all of those things, is that what's on an estimate?

A Yes. It was all separate by whoever — for example, the painter was making his money. The

body work, the body guy who fixed the parts was getting the car ready to the painter.

So the adjuster is the one who makes sure that everything is divided. So everybody has a role to go. It's a process.

Q Is it fair to say that the adjuster, because he works on behalf of the insurance company, wants to make sure they are not going to pay too much to have a car fixed?

A Right.

Q Did each of the insurance companies typically have the same adjuster that would come to your shop?

A Pretty much, most likely, yes.

Q Did you become familiar with the various adjusters from the different insurance companies?

A Yes, yes.

Q Now how would Majestic make money? How did money get into Majestic?

A Through the insurance companies.

Q How would the money get from the insurance company to Majestic?

A Say that again.

Q How did the money get from the insurance company to Majestic?

A By check.

Q Was the check typically made out to Majestic or to the person whose car got fixed?

A Most of the time it was to the customer and Majestic, and sometimes it was just through Majestic, and sometimes it was just the check was sent over to the customer.

Q Did Majestic have any other source of revenue beside the insurance company proceeds to fix the cars?

A No, no.

Q What did you do with the insurance company checks that Majestic would get? What would you do with them?

A We would deposit to the bank.

Q Did you deposit them into a personal account or a business account?

A Business account.

Q In the beginning, say in the early 2008 time frame, how was it that you would get cars to Majestic?

A In the beginning did you say?

Q Yes.

A How we started getting cars through insurance you mean?

Q Well, let me back up. Did you advertise?

A Some.

Q Did you go to accident scenes and try to get people to come to get their cars fixed?

A Yes.

Q In early 2008, did you have a high volume of cars coming into Majestic?

A No.

Q Did there come a time when you started to pay Baltimore police officers to refer cars to Majestic?

A Yes.

Q Approximately when was that?

A That was beginning 2009. I can't recall, but it was around there.

Q Could it have been as early as 2008?

A Yes.

Q Is there a particular officer who was the first officer that you recall paying money to refers cars to Majestic?

A Yes.

Q Who was that?

A Officer Corona.

Q Corona?

A Yes, Jhonn Corona.

Q How is it that you met Mr. Corona?

A He lived in the same neighborhood that I lived. So he used to come a lot to get his car fixed, mechanical work on his own vehicle. So he come up with the idea to — actually, it was another towing company that we used to use. I wasn't the owner.

So he comes up with the idea with these two guys that had been working for Majestic pretty

much, because they were there most of the time doing towing for us. So he talked to them first to how to bring accident cars to Majestic. So that's how everything started, through this guy, and this guy explained to me. That's how everything started.

Q Was Jhonn Corona the first officer that you paid?

A Yes.

Q When you first paid Mr. Corona how much money were you paying him?

A It was around $150.

Q Did it come to be that you started to pay other officers besides just Corona?

A Yes.

Q How is it that they found out about it?

A It went through Officer Corona. He started telling other people.

Q Between 2008 and 2009, and when you were arrested in 2011, can you estimate approximately how many Baltimore police officers you paid to refer cars to Majestic?

A It was more than 60 police officers.

Q Were some of those officers some that you would just see one or two times versus a lot of times? Did they vary?

A They varied, yes.

Q Why was it beneficial to you to have police officers refer cars to Majestic?

A So that way I can maintain the shop running. It was beneficial because they are the ones who go to the scenes. When first the accident happens, they are the first people to go to the scenes. So the car, instead of the car going to the city or going to the other shop, they will come to the shop.

Q If cars come to the shop to get fixed, what happens to Majestic?

A Well, Majestic, we will pay the officers.

Q Then does Majestic make money from the insurance companies?

A Yes.

Q Now how would the officers contact you to let you know about a car?

A By phone, phone calls.

Q What phone would they call?

A My cell phone.

Q What was your cell phone number?

A It was XXX-XXX-4614.

Q Did you say it ended in 4614?

A Yes.

Q Now when you would pay the officers, where would you get the money from?

A It was from the bank. Sometimes it was the bank. Sometimes it was cash.

Q Was there a particular account that you would utilize?

A Yeah, from the business account.

Q Did you use your personal bank account or the Majestic bank account?

A The Majestic bank account, yeah.

Q Did you ever give police officers your business card?

A Yes.

* * *

[156–169]

[DIRECT EXAMINATION OF
HERNAN ALEXIS MEJIA MORENO]

[BY MS. KELLY:]

Q What if you sent Rene to tow a car and you weren't there? What would you do? How would you get this filled out?

A Well, we used to give him a stack so he could keep in his own tow truck, and he used to just give it to the people, to the drivers.

Q Then how would it get back to you?

A Either he would put it inside the vehicle that was in the accident or bring the paperwork the next day.

Q Did there come time that officers were telling accident victims that you would pay their deductible?

A Yes.

Q How did that come to be?

A It was through an officer's idea, because back in those days, the customers, they just — the cars come to the shop. The cars didn't stay. It was going somewhere else. I ended up regardless paying the officer.

So it was an officer that come up with that idea tell, them not to pay the deductible so that the vehicle can stay in the shop. So the customer won't say anything.

Q Did that ultimately become sort of the common practice?

A Yes.

Q With all of the officers?

A Yes.

Q Did Majestic also sometimes pay your customers' rental car bills?

A Yes.

Q Why is that?

A So we used to have too many vehicles in the shop. Sometimes the insurance, they just pay 30 days, sometimes 15 days. It depends on the amount of the damage on the vehicle. That's how the insurance will pay for the rental car.

So we used to past those days. So for the customer not to get mad, the shop, we used to just pay it out of pocket, the rental car, so the customer can be happy.

Q Now after you started paying police officers to refer cars to Majestic, did the volume of cars that you had increase?

A Yes.

Q By a lot or a little?

A A lot.

Q Could you estimate in, let's say January of 2011, what the percentage of your cars were that were referred by officers at Majestic?

A I would say 95 to almost a hundred percent.

Q Did it increase quickly or did it take some [] time?

A No. It increased quickly.

Q Is there — strike that.

For an insurance company to pay Majestic for tow charges, does the adjuster have to determine that the car wasn't drivable?

A Yes.

Q So, for instance, I can't get my car towed if I could have driven it and expect to get repaid by my insurance company?

A Right.

Q So in the times when you submitted fake tow receipts and the car had been driven in, what did you do to the car to convince the adjuster that it was not drivable?

A Make that car that it was not drivable. For example, if it was a taillight, that it was near the

accident, just break the taillight so the car would not be drivable.

Q Are there protocols that an insurance company would determine that a car is not drivable?

A I cannot understand that.

Q What has to be wrong with the car for it not to be drivable?

A The bumper has to be down for the insurance or for the adjuster specifically, things that are dangerous for the customer, the driver to drive the car.

Q What about the side mirrors?

A That can be, yes. Mirrors, it can be mirrors. It can be bumpers. It can be headlights, taillights. It can be busted windows.

Q You or somebody at the shop would actually do that damage to the car?

A Yes.

Q Did the accident or did your customer always know you were doing that?

A Most of the customers, yeah.

Q Were there some that didn't?

A Some, yeah.

Q Did you also add damage to cars simply to increase Majestic's profit?

A Yes.

Q Did you do that to every car that was at Majestic?

A Not to every car.

Q Did the customers know that you were doing that?

A Say again.

Q Did the customers whose car it was know that you were doing that?

A Some of the customers.

Q But some didn't?

A Some didn't.

Q Have you ever heard of a person named Chupa?

A Yeah, I heard about Chupa.

Q Do you know his real name?

A No.

Q Who is Chupa to you?

A He was a tow truck driver that every time I was being called by an officer on the scene, he was always there too. It wasn't his own tow truck. It was just another company's tow truck.

Q When you had the falling out with the Martinez brothers that you described earlier, do you know whether they started towing for another body shop?

A Yes.

Q And who is that?

A It is called, used to be call — it's not any more — Best Body Shop.

Q Did at some point some of the officers who had been referring cars to you stop referring them to you, but instead, to Best Body?

A Yes.

Q Did Chupa have anything to do with Best Body, to your knowledge?

A He used to tow the vehicles over to that shop.

Q Now you said that you sometimes would drive the Mario's tow truck?

A Yes.

Q Would you drive the Mario's tow truck into the city to pick up cars that had been referred by officers?

A Yes.

Q Was there any risk in going into the city to pick up cars?

A It was a lot of different risks, you know.

Q Describe that if you would for the jury.

A It can be people from the city. It can be other tow trucks that were getting mad, especially at night. You always kind of fear about going at night into the city.

Q Was it competitive to tow trucks in the city?

A Yes, very.

Q And who was in competition?

A It was, I believe it was Frankford Towing. It was — I can't recall, but it was some big companies.

Q Big tow companies?

A Big tow companies.

Q Do you know what a Medallion tow company is?

A Back then I didn't know what it was. Now I do. I know.

Q Did you ever apply to be a Medallion tow company?

A No. I tried. But to apply to be a Medallion company, you have to have more than 10 or 15 tow trucks. You have to be a big company.

Q And you never had 10 or 15 tow trucks?

A No.

Q Did you have any understanding one way or the other as to whether your tow company was permitted to tow vehicles in Baltimore City?

A Yeah.

Q What was your understanding?

A My understanding — well, at the beginning, I thought it was just I can tow any cars. I don't recall what year it was. A sergeant — I forgot his name — he brought paperwork over to Majestic saying what kind of vehicles we can tow.

So about the specific time it was saying in the paper if the vehicles were impeding traffic in the middle of the street, you cannot pick it up. It was just the vehicles that they were on the side of the street.

Q So what was your understanding? Which cars could you not tow?

A The ones that were in the middle of the street impeding traffic.

Q The ones impeding traffic?

A Yes.

Q That it would be okay for you to tow cars that were parked that were not impeding traffic?

A Yes.

Q Did officers who referred cars to you refer cars to you that were in fact in the middle of the street?

A Yes.

Q Now did you have any particular type of cars that you preferred to come to Majestic?

A The newer models.

Q Why newer models?

A The older models, the insurance, they would call a total loss, because there's a limit to every vehicle.

So the new models, they were more expensive. It's a little harder for the insurance company to total loss those vehicles.

Q Why does Majestic not want the car to be a total loss?

A Because they want to make money. We want to make money.

Q If a car is a total loss, does Majestic fix it?

A No.

Q Did you have any preference about whether cars had insurance or not?

A Well, the car has to have insurance, yes.

Q Why is that?

A So the insurance can pay for it, for the balance of the vehicles.

THE COURT: Let me know when you're at a good breaking point.

MS. KELLY: This is probably as good a time as any.

THE COURT: We well take a ten-minute recess and we will be going until about five.

(The jury was excused and a recess was taken.)

(The jury entered the courtroom.)

THE COURT: You can be seated.

Ms. Kelly.

MS. KELLY: Thank you.

BY MS. KELLY:

Q Mr. Moreno, prior to the break we were discussing that you would prefer cars that had insurance coverage. Do you remember that?

A Yes.

Q Were there sometimes that you would inquire of the officer whether a car's air bags had deployed?

A If it's a newer model, if the air bags from the vehicle, they deploy, the insurance will total loss the vehicle.

Q So do you want cars with air bags deployed?

A No.

Q Explain again why you don't want cars with air bags deployed.

A Because if it's a new model vehicle, 2010, 2011, if it has two air bags or one air bag deploy, the adjuster total loss the vehicle.

Q If the car is a total loss, then what?

A Then we don't get paid, but we still pay the officer.

Q Did you talk openly with each officer about adding damage to the cars once they were at Majestic?

A Most of them.

Q But all of them?

A Yes.

Q All of the officers?

A Most of the officers, because there were some officers that they might send just one vehicle, and they disappeared. But it was most of them, yes.

Q Were there officers who did not know, who you didn't talk to about adding damage to the cars?

A The officers that were sending more, I mean a lot of cars to the shop, they know. They knew about it. But what I can say, if it was an officer that just sent one car a month, we didn't discuss that.

Q So there were some officers who you did not discuss it with?

A Yes.

Q Were there some police officers who would provide you with accident reports or MAARS reports about damage to cars that they didn't actually see get damaged?

A Yes.

Q Were there a lot of officers who would do that or a few?

A It was a few.

Q Can you estimate how many?

A I would say about five, ten officers.

Q When you would pay officers with cash, did you usually have to go to the bank or did you keep large sums of money at Majestic?

A Usually we go to the bank.

Q Did sometimes you pay some officers by check?

A Sometimes.

Q Were there some officers that you never paid by check?

A It was some, yeah, I didn't pay by check. I never paid by check, yes.

Q If you paid the officer by check, what would you indicate the reason was?

A If I never paid by check?

Q I'm sorry. If you wrote a check to an officer, would you indicate what the reason was?

A Well, we would put on the bottom of the check refers or sublet.

Q Sublet?

A Yes.

Q Did you sometimes write parts?

A Parts, yes.

Q The checks weren't for parts; is that right?

A No.

Q And they weren't because they were subletting space?

A Right.

Q Did there come a time in 2010 when you didn't pay officers by check anymore?

A Yes.

Q Why was that?

A The reason why, it was more the officers who were sending cars to the shop. It was whatever they preferred. So by that time, most of the officers were just requiring by cash better than checks.

Q Did you and Edwin have any disagreements over the fact that Majestic was paying officers to refer cars?

A Yes, sometimes.

Q What was the disagreement?

A That disagreement was that we were getting too many cars and the shop wasn't making money. So all the money was going to the rental cars. It was going to the officers. It was going to parts. That was most of the disagreement about it.

Q So while your volume of cars was increasing from 2008 to 2011, how would you describe your profits?

A It was a mess. We couldn't — my job was to maintain the shop, bring in cars, bring in customers to Majestic.

Q Did Majestic have profits in 2010?

A We used to keep some, not a lot of money in the back, but we used to keep some money. Yes.

Q But was the profit consistent with the increase in volume of cars?

A Yes.

Q Turning your attention to February 2011, were you and your brother arrested?

A Yes.

Q Are you aware that a search warrant was executed at your home?

A Yes.

* * *

[175–189]

[DIRECT EXAMINATION OF
HERNAN ALEXIS MEJIA MORENO]

[BY MS. KELLY:]

Q How do you know Mr. Ocasio?

A How do I know Mr. Ocasio? I know Mr. Ocasio through other officers.

Q What kind of relationship do you have with Mr. Ocasio?

A Instead of — I just know Mr. Ocasio just through sending cars to the shop.

Q Are you friends with him?

A No.

Q Have you ever been to a social function with him?

A No.

Q Have you ever played soccer with him?

A No.

Q Have you ever been out with his wife and your wife?

A No.

Q Did you meet or did you speak with Mr. Ocasio for the first time in May of 2009?

A Yes.

MR. CROWE: Objection, Your Honor.

THE COURT: Overruled.

BY MS. KELLY:

Q I'm going to show you what has been marked as Exhibit 75A, just the first page. Do you see at the top of this page where it reads statement for?

A Yes.

Q What does it say?

A At the top of the statement it says Majestic Auto Repair Shop, LLC, statement for.

Q Do you see a mobile number?

A Yeah. That's my cell phone number.

Q Do you see the highlighted portion there?

A Yes.

Q Do you see a phone number listed there?

A Yes.

Q Do you recognize that phone number?

A Yes.

Q Whose is it.

A Samuel Ocasio.

Q Does that show on May 14, 2009, he called you?

A Yes.

Q Is that around the first time that you started to speak with Mr. Ocasio?

A Yes.

Q Can you recall the first time that you spoke with Mr. Ocasio?

A That I don't remember exactly what we talked about, but I do remember that we spoke.

Q Can you recall the first time that you actually met him face to face?

A The first time, if I'm not mistaken, the first time I met him, it was an accident. It was a white Ford Taurus. It was like a 19 — I mean 2006 or 2008.

It was on Lombard. I don't remember the other street. But that was the first time that I recall that I met him. But it was something quick. It was nothing like we talked for four minutes. It was something like in and out.

Q So you're saying that the first time you met Samuel Ocasio was on an accident scene?

A Yes.

Q You had never fixed his car?

A No.

Q Had never met him in any other way?

A No.

Q You recall that the car that was in the accident, is that what you were describing, was the Ford Taurus?

A The Ford Taurus.

Q Okay?

A It was a white Ford Taurus.

Q Now generally speaking, when you spoke to Mr. Ocasio, was it in Spanish or English?

A Spanish.

Q Do you know what country Mr. Ocasio is from?

A I believe he is from Puerto Rico.

Q Were you able to understand him when he spoke to you?

A Yeah, like 95 percent.

Q Do you recall how it was that Mr. Ocasio got your phone number and called you?

A I believe it was through an officer.

Q Do you have any idea who that officer is?

A I recall that it might be two officers. It might be Officer Rodriguez, which is from the same country, or another officer. His name is Angel Gonzales. He's from the same country as well.

Q Why is it that you think it was one of those two who gave Ocasio your phone number?

A I think it was more through Rodriguez, because they used to talk a lot.

Q Have you ever seen Mr. Ocasio and Rodriguez together?

A Yes.

Q Did you ever pay Rodriguez for referring cars to you?

A Rodriguez, yes.

Q Did you ever see Mr. Ocasio with any other police officers than the two you just named, Rodriguez and Gonzales?

A No.

Q When was the last time before today that you saw Samuel Ocasio?

A It was last year. It was at Majestic.

Q Was it before or after you were arrested?

A After.

Q Why did you see him?

A Well, he just came to the shop.

Q Did you invite him?

A No, I didn't invite him.

Q What happened when he got there?

A I remember I was not working, but I was with the mechanic, Leo, the mechanical guy. We were working. I think my stepfather was there too.

So he just come and talk to me about the incident after we were arrested. I remember he told me that, he said that it was on camera or something at my house, that you guys had it installed so to keep track of what I was doing.

Q He told you that there were cameras installed at your house by the government?

A Yes, yes.

Q Is Samuel Ocasio one of the Baltimore police officers that you paid for referring cars to Majestic?

A Yes.

Q Was there a particular time of day or night that Mr. Ocasio would typically call you?

A Yes.

Q And what was that?

A It was when there was an accident.

Q But I mean was it particular to the day or nighttime?

A It was the nighttime.

Q Usually overnight?

A Yes.

Q Do you know a Baltimore police officer named — strike that.

How do you know Kelvin Manrich.

A I know him through other officers.

Q Another officer. Who?

A That used to work the Northeast District.

Q Who is that officer?

A I believe it's Valentine.

Q Last name Valentine?

A Yes. I think the first name is Osvaldo.

Q Osvaldo?

A Yes.

Q Is that spelled O S V A L D O?

A Yes.

Q I'm showing you what has been marked as Government's Exhibit 76. Do you see Government's Exhibit 76?

A Yes.

Q Do you see that the first date that is on here is February 21, 2010?

A Yes.

Q Is that approximately when your first contact was with Mr. Manrich?

A Yes.

Q Do you know which district it was that Mr. Manrich worked in?

A Northeast District.

Q Do you know whether the Northeast District is close to Majestic or not?

A Yes, it is close.

Q Does Mr. Manrich speak Spanish or English?

A He speaks English.

Q To you?

A Yes.

Q Were there other Baltimore police officers in the Northeast to whom you paid money to refer cars to Majestic?

A Yes.

Q I think you mentioned Officer Valentine, right?

A Yes.

Q Was Officer Rodriguez also in the Northeast?

A Yes.

Q Have you ever seen or know Officer Manrich to be on a scene or have association with Officer Valentine?

A Yes, there were. There was a lot of times when they would talk to each other or I would see them together.

Q How about Officer Manrich and Officer Rodriguez?

A Yes, but it was more with Officer Valentine than with Rodriguez.

Q Do you recall the first time that you met Officer Manrich?

A The first time that I met, I don't know exactly what date was it, but I do remember exactly how I met him, yes.

Q Where were you?

A I was at Majestic and I got a call by Officer Valentine to go to an accident scene. Officer Manrich was at that accident. So that's how I met him.

Q Mr. Manrich was at the accident scene?

A Yes.

Q With Officer Valentine?

A Yes.

Q Do you have a friendly relationship with Mr. Manrich?

A No.

Q Do you ever go to parties with him?

A No.

Q Do you know his family?

A No.

Q Did Mr. Manrich have any nickname that people often called him?

A Not people, but we used to. Sometimes we just called him Hindu.

Q Hindu?

A Yeah.

Q When you say we, who do you mean?

A Like people from the shop.

Q Your brother?

A My brother, yeah, Milton.

MS. KELLY: Court's indulgence.

Q Mr. Moreno, we are going to start going through various incidents chronologically. Okay?

A Okay.

Q All right. Turning your attention to a night at the Latin Palace, have you ever been there?

A Yes.

Q Do you ever recall a time that you were there with Officer Rodriguez?

A Yes.

Q Could you tell the jury how it was that you came to be at the Latin Palace with Officer Rodriguez?

A Officer Rodriguez, he was driving a Toyota Corolla, a 2010 I believe. He couldn't make the payments on the vehicle. He had some connections with this guy Leo Sarmiento, which is the mechanic, to have the car disappear.

So he passed by the shop to pick me up. So we came and parked the car, or he came and parked the car somewhere.

The car had already disappeared. We were just going to go in his vehicle to call the police and make a statement.

So when he picked me up in his own car, a Honda Civic, two door, we were on the way to do that, and I got a phone call by Officer Ocasio that he had an accident scene, that we have to go.

So we come back, left Officer Rodriguez vehicle in the shop, and we left in the tow truck.

Then I got another phone call, telling me to wait. I don't know if everything was clear.

But at the time I was in the tow truck with Officer Rodriguez, so he was asking what we're going to do. You know, Officer Samuel called me back so we can pick up another vehicle.

So I told him we can hang out at the Latin Palace, which is a club, a Spanish club that is on Broadway. So we hang in there for a couple of minutes until Officer Ocasio called me.

But I recall that Officer Ocasio called back and talked to Rodriguez, because I didn't know where the address was, how to go to pick up the car.

So that's how it ended up like it did. We ended up going to the scene with Officer Rodriguez, and Officer Ocasio was at the scene.

Q So let me back you up. When you said that Officer Ocasio called you and you had to go back and get the tow truck, which tow truck did you get?

A It was Mario's. I was driving it.

Q So at this time you had Mario's tow truck?

A Yes.

Q Did you and Rodriguez ride in the tow truck together?

A Yes.

Q And you drove it to the Latin Palace?

A Yes.

Q Do you recall where it was that you went, where the scene was where Samuel Ocasio called you to go to?

A It was, if I'm not mistaken, it was the same street that I had first met him, but it was just down — it was a little hill — down the street.

Q I'm going to show you —

Well, let me ask you this. The call that you got from Samuel Ocasio, was it during the day or the night?

A During the night.

Q I'm showing you what is marked here as Government's Exhibit 75B. Do you see this?

A Yes.

Q Do you see here where I'm pointing here, January 17, 2010, at 12:22 a.m.?

A Yes.

Q Do you see — well, let me ask you, whose phone number is this?

A That's Mr. Ocasio's number.

Q Whose number is this?

A My cell phone number.

Q January 17, 2010, about the time you were at the Latin Palace?

A Yes.

Q I'm sorry. What area of the city did you say that you went to with Rodriguez with the tow truck?

A It was by Lombard. It was almost the same street that we first met. It was on Lombard, and I cannot recall the other street.

Q How far away from that is the Latin Palace?

A I would say about 15 to 20 minutes, maybe.

Q When you got to the accident scene, was Officer Rodriguez with you in the tow truck?

A Yes.

Q And was Mr. Ocasio on the scene?

A Yes.

Q Did Officer Rodriguez and Officer Ocasio speak to one another?

A They talked, but it was like, they were like pretending that they didn't know each other.

Q That's what it seemed like to you?

A Yes. Officer Rodriguez, he was still wearing his uniform, the police pants. He was still wearing his gun and he was wearing a white shirt.

Q Did he have his uniform shirt on?

A No, just the pants.

Q Just the pants.

A But he was wearing his gun.

Q Just so we're clear, you and Rodriguez were on your way to falsely report Rodriguez's car being stolen?

A Right.

Q You were going to go with him to do that?

A Right.

Q Do you remember what kind of car it was that you picked up in the tow truck with Rodriguez that night?

A I believe it was an Infiniti.

Q An Infiniti?

A Yes.

Q I'm going to show you Exhibit 39A. Can you see that picture?

(Government's Exhibit Number 39A was received.)

A Yes.

Q I'm going to bring them up to you. There might be a little bit of a glare.

Do you know what kind of car that is?

A That's an Infiniti.

* * *

[231–232]

[DIRECT EXAMINATION OF
HERNAN ALEXIS MEJIA MORENO]

[BY MS. KELLY:]

Q Now turning your attention to the middle of this page, when you said to Mr. Ocasio, no, but when you talk to the guy, look, blah, blah, blah, blah, and what, did you lose your touch, Samuel, or what's the matter, what were you asking Mr. Ocasio at that time?

A He forgot how to talk to people?

Q What do you mean talk to people?

A Like try to convince people so that he can bring cars to the shop.

Q When you say people, who are you referring to?

A Customers, like the drivers of the vehicles.

Q Where does he encounter these people?

A In the accident.

Q So the people who are at the scene?

A Yes.

Q Generally speaking, why are you and Mr. Ocasio discussing the different types of cars on the scene and what years the cars are, years and type?

A Because I didn't want the cars being too old. I just wanted the cars that were a newer model, and if they were in an accident, so we could fix them in the shop.

Q Why is it that you want these cars, the newer cars to come to the shop so you can fix them?

A So we can get paid and we can pay the officers as well.

MS. KELLY: All right. If you could, Michelle, please play a portion of Call 1813, which correspond with Exhibit Number 91E.

THE COURT: I'm thinking this might be a good time to break —

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. **CRIMINAL No. CCB-11-0122**

SAMUEL OCASIO, et al.

Defendants.

JURY TRIAL DAY 3

Before: The Honorable Catherine C. Blake
United States District Judge

Baltimore, Maryland

February 15, 2012

* * *

[119–121]

[DIRECT EXAMINATION OF
HERNAN ALEXIS MEJIA MORENO]

[BY MS. KELLY:]

Q Now I'm turning your attention to the beginning of this call, where Mr. Ocasio says what are you doing, are you trying to take my Southwest connection away from me? What did you understand him to be talking about?

A What I'm understanding is because he was trying to gather connections to other officers about getting cars to the shop, and I believe Victor was working that sector. So because Victor bring his car over to the shop, he thought he was talking to Victor about bringing cars to shop.

Q When you say you thought Victor worked in that sector, do you mean in the Southwest District?

A Yes.

Q So Victor was an officer in the Southwest District, and is that what you're talking about in the call?

A It seems like it, yes.

Q Is that what you remember?

A Yes.

Q Then when Mr. Ocasio says that's my, that's my Southwest connection, I'm trying to set up an intensive network of intensive tow trucks, what did you understand Mr. Ocasio to be talking aren't?

A Because other officers in other sectors, he took that example from other officers. The other officers were making money off other officers.

For example, there were officers who tell other officers to bring cars to the shop, but they will pay him like $50 and they will keep the rest of the money.

Q After this phone call, did you meet Victor in person?

A Yes.

Q Did you talk to Victor about referring cars to Majestic for money?

A I asked him and he said he already knew about it.

Q The best that you can recall, what did you say to Victor about referring cars to Majestic?

A Did you talk to, I remember I said to him did you talk to Ocasio about cars, sending cars here, and he said yeah, I already got it.

Q Did he seem to understand what you were talking about?

A Yes, yes.

Q When you said earlier that Victor's car was a total loss — do you remember that?

A Yes.

Q Did you add damage to Victor's car?

A It was a small accident, because the car wasn't worth much anyway. It was a small thing. It was little damage. It was nothing big.

* * *

[185–200]

[CROSS-EXAMINATION OF
HERNAN ALEXIS MEJIA MORENO]

BY MR. CROWE:

Q Let me change the question. You in fact recruited most of the officers, did you not?

A I didn't recruit anybody.

Q Was it also true that after the scheme got going, about 90 to 95 percent of the cars Majestic received were things that were referred by police officers?

A Right.

Q You had a private office at Majestic, didn't you?

A Did you say private office?

Q Private office, yeah?

A No.

Q You had an area where your desk was?

A No.

Q Did you have a wall in Majestic where you had pictures of cars that you were fixing?

A It was pictures in the front of it, but it was for all cars.

Q Did you tell people on occasion that almost all of those cars were referred by police officers?

A Tell people that?

Q Yes.

A No.

Q Do you know a man by the name of Andre Hibler, a Baltimore City police office?

A You say Andre?

Q Andre.

A I don't remember his name.

Q Don't remember that name at all. The last name was Hibler, H I B L E R?

A No. Maybe if I see his face, I probably would remember, but I don't know.

Q Okay. But you were the person who arranged for payments for the officers, weren't you?

A It was me. It depends if I was there or if there was Edwin there.

Q But if you and Edwin were both there, that was your job?

A Right.

Q You in fact were much more involved than your brother, Edwin, were you not?

A Right.

Q Now there were also officers who in turn recruited other officers; isn't that right?

A Right.

Q On some of those officers, for a period of time, payment to several officers would go to the primary officer who did the recruiting, and then they would split up the money. Is that correct?

A Right. It was pretty much one officer would tell others, but he didn't tell how much money so he could pay the others.

Q But Mr. Ocasio was never one who had any officers, even by your accounts, any officers underneath him?

A He start with Victor.

Q Pardon?

A He start with Victor.

Q Victor is the fellow whose car was called from the Southwest District?

A I think so, but he started with Victor, telling Victor. Then it's in here saying, he spoke to me saying that he was going to create a network.

Q We'll get to that too in a little while. But essentially you're saying that the only one that he referred to you is this fellow named Victor?

A Right.

Q Mr. Ocasio wasn't working under any other officer in the sense that you were paying the other officer to pay him; is that correct?

A He was referred to Rodriguez, I believe, or Gonzales. But I don't know if they gave him money. I don't know.

Q But it was not a situation where you were paying either Rodriguez or Gonzales and they were funneling the money down to Ocasio?

A No.

Q Essentially the agreement that you testified you had with Ocasio was just between you and him, wasn't it?

A It was between him and Rodriguez as well, because Rodriguez knew a lot about Ocasio.

Q But even by your account, Rodriguez didn't participate in what he was doing?

A I don't know. I don't remember if he took money or not from Ocasio.

Q You don't remember. That's fine.

Now am I correct that tens of thousands of dollars were paid out by Majestic to police officers in the form of checks?

A It was checks or cash.

Q Am I correct that tens of thousands of dollars were paid out to Baltimore police officers by check?

A I said both. It was checks or cash.

Q Am I correct that —

THE COURT: I think you're not understanding his question, Mr. Moreno.

I think if you would just tell him you want to know the amount of the checks.

Q I'm just asking about checks. Is it true that checks were written to Baltimore City police officers out of Majestic's account, and that if you added up just those checks, it would have been tens of thousands of dollars?

A Right, yes.

Q There was never any check paid to Mr. Ocasio, was there?

A That I don't remember.

Q You don't remember? Was there ever any check paid to Mr. Manrich?

A That I don't remember either.

Q Have you ever, have you or, to your knowledge, has your brother, Edwin, sat down and tried to total the sum of all of those checks?

A Did he what? I'm sorry.

Q Have you ever sat, have you or Edwin ever sat down with the checks in front of you and added them all up to see what they amounted to?

A Oh, no, never.

Q Do you know if the FBI or if the Baltimore City Police Department has done it?

MS. KELLY: Objection, Your Honor.

THE COURT: Overruled. If he knows.

Q Do you know if law enforcement has done it?

A I don't know.

Q Have you ever sat down and tried to calculate how much money was paid out to Baltimore City police officers in cash?

A I don't know, sir.

Q Is there any way, is there any way you could do that from the records that you have right now?

A Right now, I don't have any records with me. Sorry.

Q If you had the record, is there any way you could do it?

A It would be tough because I don't know. It was not just officers. It was some people involved, like regular customers that were bringing in some cars, and paying cash as well. So it would be tough to say how much.

Q Do you have any idea as to, you know, to the nearest hundred thousand dollars how much was paid out in cash?

MS. KELLY: Objection, Your Honor.

THE COURT: Sustained.

MR. CROWE: Say that again.

THE COURT: There's no number that we've got in evidence like that.

MR. CROWE: Okay.

BY MR. CROWE:

Q Is it your understanding that at least a hundred thousand dollars —

MS. KELLY: Objection.

THE WITNESS: I don't know, sir.

THE COURT: Overruled. I think where he was going, you're asking what his recollection and understanding is?

MR. CROWE: Yes.

THE COURT: Go ahead.

BY MR. CROWE:

Q Was it at least a hundred thousand dollars?

A I don't know.

Q You don't know. Okay.

Now you have testified in terms of the cash — You said that once this scheme got going, police officers were bringing in cars all the time, didn't you?

A Right.

Q In fact, I think you even said that there was, there was a disagreement between you and your brother. Do you recall mentioning that this morning?

A Right.

Q The disagreement, I think you said, had something to do with the fact that you had an awful

lot of cars coming in, but, you know, you had an awful lot of expenses in terms of paying officers, you know, absorbing people's deductibles, and things of that nature, that Majestic was not making very much money?

A Right.

Q What was the disagreement between you and Edwin? What was your position, and what was Edwin's position?

A It was that we have too many cars in the shop, and the shop was too small.

Q Was there a disagreement between the two of you on that point?

A It was just about that. It was too many cars, and we didn't have enough people in the shop. It was too small.

Q Did you and Edwin have a disagreement as to whether you should —

Well, you said that you and Edwin had a disagreement. What was the disagreement?

A Just about that.

Q I understand it was about that, but what was his position, and what was your position?

A Well, my position is to either tell not to bring any more vehicles to the shop, but it was more than we would just wake up, because at the end, I just stopped going out and there were vehicles parked in front of the shop. The cops were like that's mine, and I don't even know if that was their cars.

Q So your position was you wanted to shut it down, or at least slow it down?

A Right.

Q And what was Edwin's position?

A Same thing.

Q Okay. In fact, cars were coming in very, very frequently, weren't they?

A Right.

Q When you had your trip to Honduras in December of 2010, you were getting calls from your brother about the number of cars that was coming in, and it was quite a bit, wasn't it?

A Well, it seemed like it was a lot of activity, but it was not that many. It was maybe two, one or two cars.

Q I think we also played a call between you and Mr. Manrich where you were saying, in fact, shortly after you got back from that trip, where you were saying that an awful lot of cars were coming.

Do you recall listening to that this morning?

A I'm sorry. Say that again.

Q Do you recall listening to a call this morning where you were telling Officer Manrich that a lot of cars were coming in?

A No, no, that a lot of cars were going out. That's what it is on that thing.

Q A lot of cars were going out?

A Out.

Q From where to where?

A No, no, out. Like we're getting cars finished, so we are getting a lot of cars out.

Q You were turning around a lot of cars and sending them out?

A Right.

Q Now did you tell — when you first talked to the FBI, you told, and to Detective Smith, you told them that you thought Rodriguez had recruited Mr. Ocasio, didn't you?

A No, I told them that it can be between Rodriguez or Gonzales.

Q Well, didn't you originally tell them that it was Rodriguez alone?

A No. I said it was Rodriguez or Gonzales. I couldn't remember who exactly was the person.

Q Did you later tell them that it could have been either Rodriguez or Gonzales?

A I think from the beginning I was telling them that it was both.

Q Okay. Well, we'll explore that with other people.

Did you in fact even tell the agents that you recalled that Mr. Rodriguez had introduced Mr. Ocasio to you at Majestic?

A No. It was over the phone. The first time I ever talked to him was over the phone.

Q You're saying that it was over the phone?

A Right.

Q Did you later explain to Special Agent Guynn and Mr. Smith that you knew that Rodriguez and Ocasio talked, and you just assumed that Rodriguez had made the introduction, but you did not know it?

A Because he, Officer Ocasio talked about Rodriguez and talked about Gonzales as well.

Q The question was — I'm not sure that you answered the question. I am not sure that I heard the answer.

Did you at a later time tell Special Agent Guynn and Detective Smith that you had said Rodriguez had introduced you to Ocasio because you knew that the two of them talked, and you just assumed that that was the way it happened, but did not know it?

A I always heard that it was assuming that it was Rodriguez that introduced him to me, that I had spoke to him over the phone, but in the same way I know, because the same way Rodriguez and Gonzales were talking to him, that's the only people that knew

Officer Ocasio.

Q That's a conclusion that you drew from what you knew?

A Right.

Q Now you had mentioned a couple minutes ago that you thought Mr. Ocasio had referred Victor from the Southwest District to you. Do you recall that?

A Right.

Q Did you also tell the FBI that Mr. Ocasio had referred an officer from the Southeast District by the

name of Andre, A N D R E, or possibly Andres, A N D R E S, Hibler, H I B L E R?

A I don't remember.

Q You don't remember saying that?

A Yeah, I don't remember that specific officer. Maybe it was one of the officers who tried to send vehicles to Majestic. That's why I can't remember.

Q Well, you know, if in fact you told that to Mr. Guynn and Detective Smith, why would you have told them that?

A Remember, it has been a year, so it has been a long time. So back then, for me to remember every single person. Now if you tell me names, like I'm just going to remember the people who most send cars to Majestic. I'm not going to remember a person that send one car and then disappear for months.

Q Okay. Ocasio never told you that he told Victor from the Southwest District, this fellow I mentioned, Hibler, or anybody else about the scheme you had to pay people, did he?

A He did tell me about Victor.

Q Pardon?

A He told Victor.

Q When Reillo, when Victor came into your shop, and this is fairly late in the scheme, didn't you in fact explain the scheme to him?

A No. I asked him if he knew about the cars. He stopped me right there. He was like no, no, no, I've already got it, Ocasio explained that to me.

Q And you're sure about that?

A Yes.

Q Okay. One of the hallmarks of your operation was to add further damage to cars that were brought into Majestic. Is that correct?

A Right.

Q My guess is you did that more often than not?

A I don't know how often. It started with other police officers that were making false reports about damage on the vehicles and they were telling me you've got to do this because it's on the report.

So when I first opened the shop, I didn't know anything about anything. So like I was saying, yeah, it was the officers. They start writing the false report about damage on the vehicle. So the ones were telling me what to do, because it was on the police report.

Q So you are telling me that it was originally police officers who suggested to you that they should write police reports showing damage, showing non-existent damage so you could collect extra money from the insurance companies?

A Right.

Q What officers?

A You want names?

Q Yes?

A Centron, Feliciano, some other officers I can't remember, but they were the ones that —

Q What about Rodriguez and Valentine?

A Probably Rodriguez. I don't know nothing about Valentine, but they knew, they knew how —

Q So Rodriguez was writing false reports; is that correct?

A Oh, you're asking me if Rodriguez? I don't remember, sir. I'm sorry.

Q Was Valentine writing false reports?

A I don't remember.

Q Ms. Ocasio certainly wasn't writing false reports, was he?

A Ocasio, no, he didn't write false reports.

Q In fact, you testified that Ocasio, you never discussed with Ocasio the fact that you were adding damage to the cars. Isn't that right?

A I say I don't remember, but I believe I did because of the damage on his own vehicle.

Q So you think you did, but you're not sure?

A I'm positive, more positive than negative.

Q So now you're positive. Okay. I'm not making much progress.

How did you manage to add damage to cars where that damage wasn't reflected on the original MAARS Report, on the original police report of the accident?

A Well, the cops would tell me where the damage was, where to put the damage on the vehicle.

Q But when a car simply came in, and you had no idea that the report was written falsely, how could you add damage to it?

A The only way that I was adding damage to it was when the cops were telling me. So most of the time they were telling me to add damage on the vehicle.

Q So if the cop didn't, if the cop didn't tell you that there was damage, about non-existent damage in the report, you wouldn't damage the car?

A Sometimes, yes.

Q Sometimes you would. How would you decide how to further damage that car where you had no reason to believe the police report was false?

A Well, if it was damage in the same spot, just, you know, make it bigger in the same spot.

Q You would do more damage to the same spot; is that correct?

A Right.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. **CRIMINAL No. CCB-11-0122**

SAMUEL OCASIO, et al.

Defendants.

JURY TRIAL DAY 4

Before: The Honorable Catherine C. Blake
United States District Judge

Baltimore, Maryland

February 21, 2012

* * *

[36–57]

[DIRECT EXAMINATION OF EDWIN MEJIA]

[BY MS. GAVIN:]

Q Good morning, sir. Where are you from?

A Honduras.

Q When did you come to the U.S.?

A When?

Q When?

A 1997, September.

Q How old were you in 1997?

A I was 14 years old.

Q Who did you come to the U.S. with?

A My brother, Alex.

Q That's Alex Moreno?

A Yes.

Q Why did you come to the U.S.

A My parents brought us over here. They were already here.

Q Once you got here, did you go to school?

A Yes, I did.

Q Where did you go to school?

A It was New Brunswick, New Jersey, New Brunswick High School.

Q At the time that you came to the U.S. did you speak English?

A No, I didn't.

Q So you learned English once you got here?

A I'm still learning. Yes.

Q You use the last name of Mejia, correct?

A Yes.

Q Your brother uses the last name of Moreno?

A Mejia is my father's last name, and Moreno is my mother's. So when I became a citizen, I removed Moreno because it was too long.

Q When did you become a U.S. citizen?

A About two years ago, I believe. I can't remember very well.

Q After high school, did you get any further education?

A I didn't.

Q What kind of jobs have you held since you got out of high school?

A I worked for several companies when I was a minor. When I turned 18, I moved here to Baltimore and then I started working with a body shop in Laurel, actually. That's where I learned about cars and things like that.

Q Were you actually repairing cars in terms of the body or were you more running, doing office work?

A I was doing office work.

Q How long did you work for that company?

A I think I might have worked three or four years with them.

Q Then what did you do?

A Then I started at the body shop with my brother.

Q The Majestic Auto Body?

A Yes.

Q Why did you all start that business?

A It was a good opportunity. At the time, my brother was unemployed. I was still working with the company I was. I knew the system and everything, how to manage it, and Alex knew how to bring customers in, and things like that. So that's how we got it together and put it together.

Q Is Alex older than you, Alex Moreno?

A Yes, he is.

Q How much older is he than you?

A He's three years older.

Q So in connection with the running of the auto body shop, or Majestic, specifically what is it that you did?

A I was always doing the bookkeeping and answering the phone calls, dealing with customers, dealing with the employees, that type of work.

Q Did you keep track of the bank account for the company?

A Yes.

Q What kind of bank account did you all have for Majestic?

A It was a checking account through Bank of America.

Q Majestic itself, the company, what kind of company was it, do you recall, or is it? Is it a corporation or an LLC?

A LLC, and then we turned it into a corporation.

Q Who handled, did the banking? Was that you?

A It was me.

Q Now the money that would go into the bank account, the business bank account, where did that money come from?

A It came from the automotive repairs.

Q Would that be from the customers or from the insurance companies?

A The majority of it, it was from the insurance companies, and part of it was from the customers, walk-ins.

Q The insurance companies that you are talking about, just as examples, what insurance companies were sending money that would go into your bank account at Majestic?

A State Farm, Allstate, Nationwide, MAIF.

Q Progressive?

A Progressive.

Q How would the money get into the company bank account? Would it come by mail? What was the process?

A Some insurance companies, we have like direct deposit with them, such as State Farm and Liberty Mutual as well. They would put the money into the account and others, like the ones that we didn't have contracts with, they will give the customers to the shop — I mean the check to the shop or the clients. It depends.

Q Then would someone — would it be you that would deposit the checks or somebody from the company?

A The majority of the time it was me, and sometimes it was Alex.

Q In terms of the money that was in the bank account, what types of things would that money be used for?

A It was used for many things. It was used to actually buy parts, pay rent, bills, things like that, pay cops.

Q Okay.

A Pay customers as well.

Q When you say buy parts, where would you all get parts? These are parts to fix the automobiles?

A Yes, from the automotive parts, dealerships. It depends.

Q Did you ever make any purchases from auction houses and places like that for parts for cars?

A No.

Q Did you ever make purchases at any sort of car places, or wherever you go to get parts, is really what I'm asking.

A It was a dealership around in Yonkers too. Depending on how we needed to repair the car, we followed the estimate. The estimate would tell us what kind of parts the car need or what kind of parts the insurance was paying for, and we would follow the estimate.

Q Now you mentioned that you also used the money to pay police officers, correct?

A Correct.

Q Before we get to that, I want to show you what has been marked as Government's Exhibit 97 and ask you if you recognize that?

(Government's Exhibit Number 97 was received.)

A Yes.

Q What is Government's Exhibit 97?

A Excuse me?

Q What is it?

A It's my plea agreement.

Q You signed that plea agreement. If you would turn to page number, if you look in it — let me help you find the signature date.

Do you recognize — the plea agreement is dated June 2, 2011, correct?

A Correct.

Q Who is Ivan Bates?

A My lawyer.

Q So the letter is directed to him, correct?

A Correct.

Q Then looking at page ten, do you recognize your signature there?

A Yes.

Q That's dated June 20, 2011, correct?

A Correct.

Q Pursuant to this plea agreement, what is it that you have agreed to do?

A To tell the truth.

Q Have you agreed to testify, if requested?

A Yes.

Q Have you agreed to provide information to the government and respond to questions put to you?

A Yes.

Q Have any promises been made to you as to what will happen as a result of your cooperation under that plea agreement?

A No.

Q You pled guilty as a result of that pursuant to that plea agreement, correct?

A Yes.

Q You pled guilty to a charge of conspiracy, right?

A Yes.

Q And a charge of extortion under color of official right?

A I did.

Q Do you know who will sentence you at the end of your cooperation?

A The judge I guess, yes.

Q That's the same judge that's here in the courtroom, correct?

A Yes.

Q You don't know what the judge is going to decide, correct?

A I wish I knew. No, I don't know.

Q Now you mentioned that you used the money out of the Majestic bank account, that some of that money was used to pay police officers, correct?

A Correct.

Q What were you paying police officers for?

A Bringing cars to the shop.

Q Do you recall how this started?

A I have a slight memory about it. I wasn't the one directly dealing with it, but it was through Corona. That was the first cop I saw in the shop talking to my brother.

Q So who was dealing more directly with it than you?

A Hernan, Alex.

Q Your brother was?

A My brother was, yes.

Q How were the payments made to the police officers to refer cars to the shop?

A At some point at the beginning, because it was so small, they started doing checks. Then they turned it into cash amounts at the end.

Q How would you account for the cash payments and the checks that were being issued to police officers in the books of the company?

A I tried to hide it. I tried to hide it.

Q How would you try to hide it?

A Just putting it as referral of parts.

Q And you knew that wasn't true?

A Right.

Q And why were you trying to hide it?

A Because we knew that we were doing wrong. Now you had a cell phone that you used; is that correct?

A Yes.

Q What was your cell phone number?

A It's XXX-XXX-4907.

Q Did you have that cell phone number during the whole time that you knew that you all were paying the cops?

A Yes.

Q Now what was Mario's Towing?

A A tow truck company.

Q Whose tow truck company was it?

A Ours.

Q Did there come a time that you all used tow receipts from that company —

A Yes.

Q — in connection with cars being referred by police officers?

A Yes.

Q How would you use those tow receipts?

A When we towed a car, we were like writing fake, I would say, bills to insurance companies. Like we would put different amounts to kind of cover the expenses for the police.

Q Are you saying that sometimes you all would use a tow receipt to jump up the cost of the towing?

A Correct.

Q Is that when somebody else would tow the car, not Mario's?

A Correct.

Q Who else would tow cars?

A Rene Towing.

Q Is that Rene Hernandez?

A Yes.

Q Known as Ramirez Towing?

A Ramirez, that's correct. I'm sorry.

Q Using a different last name, Hernandez or Ramirez, is it the same thing as you have described with Moreno and Mejia?

A I think it's Ramirez on the tow truck.

Q Were there occasions — did you ever use the Mario's tow receipts to prepare a tow bill when the car was actually driven to Majestic?

A Can you repeat that question one more time.

Q Were there ever any occasions upon which you or someone at Majestic prepared a tow receipt, using the Mario's tow receipt, when the car was actually driven to Majestic, it was not towed?

A Yes.

Q Why would you do that?

A Because we needed to — it depends. There were several occasions where they needed to prove to the insurance company that a car was actually damaged

before it got to the shop. By writing a towing bill, we were telling the insurance company that the car was actually damaged before getting to the shop.

Q If you wrote a tow bill, would you all get paid from the insurance company for the tow, even though it didn't actually happen?

A Yes.

Q Let me show you what has been marked as Government's Exhibit 113 and ask you if you recognize that booklet?

A Yes.

Q What is that, please?

A It is Mario's Towing, the receipt book.

Q Was that one of the books that was at Majestic that you all would use to create receipts?

A Yes.

Q Let me show you what has been marked as Government's Exhibit 33. Do you recognize that?

(Government's Exhibit Number 33 was received.)

A I do.

Q What is that, please?

A It's a towing bill.

Q Whose handwriting is that?

A Mine.

Q Now the towing bill here is dated, if you look up at the top, May 1, 2010. Correct?

A Correct.

Q Do you remember how you came to write this tow bill?

A Yes.

Q Could you describe that, please?

A It was a situation where the vehicle was at the shop for several time — for sometime actually. They didn't know how to actually get the insurance to approve the damages.

Then I heard a conversation, Alex and somebody else — I can't remember who it was at the time — talking on the phone saying that they needed to create a bill and a report to actually submit it to the insurance companying, saying that the car was actually damaged on this date that my brother was giving me to actually write this invoice.

Q So what then happened? Did you get some instructions from your brother?

A Yes. Alex told me the time and the date, and everything. Then I went to the car and got the information from the vehicle and everything.

Q Do you recall the vehicle?

A Yes.

Q What kind of car was it?

A It was a Chrysler.

Q Did you know the owner's name at anytime?

A No.

Q So the date that is on there, May 1, 2010, as the date of tow, is that false?

A This date?

Q Yes.

A Yes.

Q Was the date sometime later that the car actually arrived at Majestic?

A It was already at Majestic.

Q When you wrote this tow bill?

A Yes.

Q And you backdated it; is that right?

A Exactly, yes, yes.

Q Now directing your attention to December of 2010, did there come a time that your brother went to Honduras to watch a soccer game?

A Yes.

Q Do you recall whether or not you were working at Majestic during the time period that he was in Honduras?

A Yes.

Q While he was in Honduras, what job duties were you doing at Majestic?

A I was running the shop, and I was answering police calls when there were accidents.

Q When you say answering police calls when there were accidents what do you mean?

A Police would call me and tell me that there were accidents that we need to go to, or clients, that we

need to go to their houses and visit them and talk to them about getting their cars repaired.

Q Do you know Kelvin Manrich?

A Yes.

Q Did you have any contact with him during this time period?

A Yes.

Q I'm going to show you what has been marked as Government's Exhibit 77, which is titled Contacts Between Edwin Mejia and Kelvin Manrich. Do you recognize your phone number on there as a phone number either calling or being called in the time period of September 2, 2010 to February 8, 2011?

A Yes.

Q Do you recall having contact with Officer Manrich during the December time period as reflected on Government's Exhibit 77?

A Yes.

Q So if you look on December 10, 2010, a telephone call, is that between you and Officer Manrich, at 5:05 p.m.? Do you see that?

A Yes.

Q Do you recall, subsequent to speaking to — Do you remember what you talked to Officer Manrich about at that time?

A If I remember now?

Q Uh-huh.

A I don't think so.

Q Did you ever talk to him about anything other than cars that he was attempting to refer to Majestic?

A No.

Q So if you spoke to him, it was about that; is that correct?

A Correct.

Q Now do you recall several days later speaking to your brother by telephone about Officer Manrich and cars, and a Lexus? Do you recall that conversation?

A Yes.

MS. GAVIN: If we could play the beginning of Government's Exhibit 91H for the jury. It should be the December 10 to December 15 tab in the transcripts.

MR. MARR: December 10?

MS. GAVIN: Yes, 10 to 15.

MR. MARR: The exhibit number again, please?

MS. GAVIN: It is 91-H.

Sir, we are just going to play the beginning of it so you can hear the voices.

(The audio was played.)

BY MS. GAVIN:

Q Do you recognize the voices on that call?

A Yes.

Q Who is on the call?

A It's my brother and I.

Q Do you remember speaking to him in that conversation about Officer Manrich contacting you or trying to contact you about a Lexus that he wanted to come to Majestic?

A Yes.

Q Do you recall whether that Lexus that you were speaking of eventually did come to the shop?

A Yes.

Q Now I want to direct your attention now to Government's Exhibit 115 and ask you if you recognize Government's Exhibit 115?

(Government's Exhibit Number 115 was received.)

A Yes.

Q What is that, please?

A This is a letter that our accountant wrote to us to actually organize all of our numbers because he was telling me that there was the amount of $202,000 that we had as a profit in our account, but it wasn't in our account actually.

Q So this is from May of 2010, relating to the tax year 2009; is that correct?

A Correct.

Q That's your signature down at the bottom on the first page, dated June 2010?

A Yes, ma'am.

Q Did you indicate to your accountant that the expenses included payments to police officers?

A If I told my accountant?

Q Yes.

A No.

Q Did you indicate to your accountant ever that you were paying cash to the police officers to send cars to Majestic?

A No, I didn't.

Q Did so then in terms of the cash payments, are they reflected in various categories within the books and records?

A Yes.

Q As you testified earlier, they were hidden in some way under different categories?

A Correct. All the categories have a little bit of amounts in those expense, but the majority is in the advertising and promotion.

Q I'm going to direct your attention now to February 2, 2011.

MS. GAVIN: Ms. Wicker, if we could play the beginning of Government's Exhibit 91KK. This is in the tab of February 2nd.

THE COURT: I'm sorry, which tab?

MS. GAVIN: One minute, Your Honor. I'm trying to make sure that I've got it right, 1-30 to 2-2. I'm sorry, Your Honor, 91KK.

MR. MARR: What date is it, please?

MS. GAVIN: It's session 14377.

(The audio was played.)

BY MS. GAVIN:

Q Do you recognize the voices on that call?

A Yes.

Q Who is on that?

A It's Alex and I.

Q Mr. Mejia, what I would like you to do, if you can look at, if you can look on the screen there, what I would like you to do is — EM, do you see for you?

A Yes.

Q I would like you to read your part, and Ms. Kelly can read your brother's part. Okay? So you'll start. Are you able to read it? Is it big enough.

A Yes. I can see it.

Q Go ahead.

EM: What the hell do you want?

AM: Are you still at the bank?

EM: No, dude, I'm here at my mom's eating.

AM: Did you go to the bank today?

EM: I'm going over there.

AM: I need to withdraw some money, man.

EM: How much?

AM: Nine.

EM: All right, I'll bring it.

AM: But this guy is here waiting.

EM: Have him wait then. I'm on my way.

AM: The Hindu.

EM: Huh?

AM: I said the Hindu is here.

EM: I know. He called me already. Have him wait. I'm on my way over there.

AM: All right.

BY MS. GAVIN:

Q What were and your brother talking about?

A He was calling me to tell me to get some cash out of the bank to actually pay Kelvin Manrich.

* * *

[138–143]

[DIRECT EXAMINATION OF SHANNON SEADERS]

BY MS. GAVIN:

Q Good afternoon, Ms. Seaders.

A Good afternoon.

Q How are you employed?

A I am employed with the State of Maryland, with the Department of Labor, Licensing and Regulation.

Q What do you do for that agency?

A I take unemployment claims. I take statements as to why people are separated from their jobs, and I make decisions on whether or not they are eligible for benefits.

THE COURT: If you could speak just a little more slowly.

(Laughter.)

Q How long have you been in that position?

A I have worked there for three years.

Q Do you have a particular job title?

A I am a claims specialist.

Q Where are you located?

A I am located in Cumberland, Maryland.

Q So how do you take people's claims?

A Well, basically they call in and file a claim from wherever they have been separated. Then I do the adjudication of that claim, which I interview them. They receive an appointment notice. I interview them to see what the details are regarding their separation. Then we decide on whether or not they are eligible to receive unemployment insurance.

Q The interview and the claims, receiving the claim, is that all done by telephone?

A It is, yes.

Q I'm going to show you what has been marked as Government's Exhibit 93A. It is also going to show up on your screen. Do you recognize that?

(Government's Exhibit Number 93A
was marked for identification.)

A Yes.

Q What is that?

A This is the fact-finding interview that I had in regard to Kelvin Manrich.

Q What date is reflected on this report that you had the interview?

A The interview was held on March 14, 2011.

Q Was this by telephone?

A This was by telephone, yes.

Q Do you always do a fact-finding report that looks like this when you are taking claims?

A Yes.

Q What is your process for the section on the first page? It's entitled Claimant Fact-Finding Statement. How is that prepared?

A Well, what happens is over the phone we interview the claimant, and we ask specific questions as regard to their last day of work was, what the details are as to why they are no longer working there.

We take notes. Then we prepare the statement, and then basically we destroy the notes right after that.

Q Is that your standard practice and procedure at work?

A Yes, uh-huh.

Q Just to be clear, you're saying we, but are you talking about how you do it?

A Yes.

Q And how your co-workers as far as your know do it?

A Right.

Q Looking at the Claimant Fact-Finding Statement, it is written in the first person, meaning using the words I and my. Are you taking it down verbatim what the person, in this case, Mr. Manrich, said to you on the telephone?

A Right. We do it in the first person because it is the statement that they made to ups. So this is the statement that he made to me. It's a summary of everything, but it's all the information that he gave to me.

Q Are you quoting Mr. Manrich word for word?

A It's not quoting word for word. No.

Q Is it in substance what he said to you?

A Right, yes.

Q So looking at the fact-finding statement, could you read the second paragraph that starts with on 2-28-2011?

A Sure. On 2-28-2011, I was placed on unpaid suspension due to the my involvement in a conspiracy. I have a friend who owns Majestic Auto Body, LLC. Whenever I would be on the scene of an accident, I would advise the people involved to call Majestic to tow them and do their auto repair work for them. I received financial gifts from Majestic Auto Body in exchange for sending customers their way. I would sometimes just call Majestic myself and have them come to the scene of the accident before I gave the customer the choice of who they wanted to call.

Q Then could you read the next two paragraphs?

A Sure. As a police officer —

Q Actually, right above there, there is a one sentence paragraph.

A I had no prior warnings.

Q Okay.

A As a police officer, I am not supposed to send tow business to private companies. The people involved in the accident are supposed to call for their own tow, or if they refuse, I am supposed to call a tow truck under contract with the City of Baltimore. Majestic Auto Body was not under contract with the City of Baltimore.

Q Could you read the next paragraph?

A I was friends with the owners of Majestic and I accepted money and gifts from them in exchange for sending them business. I was involved in the conspiracy and accepted kickbacks as a result. It is grounds for immediate termination for a police officer to be involved in a conspiracy.

Q Now this statement as you provided it on this report, do you recall whether or not Mr. Manrich indicated to you whether this was, these statements, this is what he was charged with or what he had done?

A He told it to me that this is what he had done. He did not say it is what he was fired for exactly. He basically just told me this is what happened, and this why he was on a suspension.

MS. GAVIN: Nothing further, Your Honor.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. **CRIMINAL No. CCB-11-0122**

SAMUEL OCASIO, et al.

Defendants.

JURY TRIAL DAY 5

Before: The Honorable Catherine C. Blake
United States District Judge

Baltimore, Maryland

February 22, 2012

* * *

[124–130]

[DIRECT EXAMINATION OF
ROBERT E. GUYNN]

[BY MS KELLY:]

Q Now I am going to turn your attention to the questions and the answers from that day with Mr. Manrich.

About how long did the interview of Mr. Manrich last?

A Probably an hour, an hour and a half.

Q Was Mr. Manrich handcuffed?

A I can't recall. If he was handcuffed, it would have been in the front.

Q Did Mr. Manrich tell you whether or not he knew somebody by the name of Alex Moreno?

A Yes, he said he knew Alex Moreno.

Q Did he say how it was that he came to meet Mr. Moreno?

A He said that officer, Baltimore City Officer Osvaldo Valentine had introduced Mr. Manrich to Alex Moreno at an accident scene.

Q And did he say anything about what Mr. Valentine said about the relationship between Alex and Officer Valentine.

A He said that Valentine told him Moreno, if he sent cars to Moreno, that Moreno would pay him for the cars from the accident scenes.

Q Did he tell you the amount that Officer Valentine said that Mr. Moreno would pay Officer Valentine?

A He did give me the amount, but I can't recall the exact dollar amount.

Q Did Mr. Manrich say whether or not he knew Alex's brother, Edwin Mejia?

A Yes. He said he knew Edwin.

Q Did you ask Mr. Manrich whether he had in fact referred vehicles to Majestic?

A Yes.

Q And what was his answer?

A He admitted that he did refer vehicles to Majestic.

Q And did he tell you when it that he started referring cars to Majestic?

A I believe it was in February 2010.

Q Did he tell you approximately how much money he had made from February 2010 to then for referring cars to Majestic?

A Approximately $5,000.

Q That's the number he told you?

A Yes.

THE COURT: Let me know when you get to a good breaking point.

MS. KELLY: This is probably actually a good point, Your Honor.

THE COURT: Thank you, ladies and gentlemen. Again, please go have lunch. Don't talk about the case. I will see you at, let's say, 2:05 back here. Let's let the jury go.

MS. KELLY: Absolutely. I apologize.

(The jury was excused.)

THE COURT: You can step down.

MS. KELLY: Your Honor, I wanted to clarify, Special Agent Guynn, it is okay that I continue to talk to him about the case over the lunch break, that there is no concern with that?

THE COURT: So long as you don't discuss with him the testimony that he has already given.

MS. KELLY: I understand completely, Your Honor.

THE COURT: Other than that, there is no reason you can't talk to him about the case. That's my understanding.

MS. KELLY: About where the testimony is going.

THE COURT: Where the testimony is about to go, right. As long as you don't talk about what he already testified to.

MS. KELLY: I understand, Your Honor. Thank you very much.

THE COURT: Do you have any witness after the special agent?

MS. KELLY: No. There may be one potentially, but it would be extremely short. I suspect we will finish after lunch.

MR. CROWE: Could we ask who that might be?

MS. GAVIN: We are not sure yet. I will tell you as soon as we know.

THE COURT: Okay. I will see you after lunch.

(A lunch recess was taken.)

AFTERNOON SESSION

THE COURT: Ready for the jury?

MS. KELLY: Yes, Your Honor. Thank you.

(The jury entered the courtroom.)

THE COURT: You can be seated.

All right. If you would like to continue.

MS. KELLY: Thank you.

BY MS. KELLY:

Q Special Agent Guynn, prior to the lunch break we were talking about an interview that you did of Mr. Manrich. Do you recall that?

A Yes.

Q Now I think the last thing you testified to was about $5,000 is the amount; is that right?

A Correct.

Q Did Mr. Manrich tell you how it was that he would typically be paid by Mr. Moreno?

A Yes. He said that Mr. Moreno would always pay him in cash, and that they would usually drive to the Bank of America over by I think Golden Ring, or the Royal Farms Store nearby.

Q Did Mr. Manrich tell you how it was that he would get in contact with Alex Moreno?

A Yes. He said he would call him using his cellular telephone.

Q Did he say where he called him from?

A The accident scene.

Q Did he give you any details about what he would do at the accident scenes?

A Yes. He said he would give the accident victims three options. He would allow them to use a private tow company such as AAA, or he would have the City tow company tow their car to the City Yard, or the third option would be he would call Mr. Moreno to come and tow their vehicle to Majestic.

Q Did Mr. Manrich indicate one way or the other about whether he understood this to violate Baltimore Police Department General Orders?

A Yes. He said that he understood that it was violating the Baltimore City General Orders, that he should have used a Medallion tow company, a contracted tow company to tow the vehicles, and he added that he knew it was illegal for accepting the money for sending the cars to Alex Moreno.

Q At some point during the interview did you show Mr. Manrich photos and ask him about them?

A Yes.

Q I'm going to show you Government's Exhibit 109. It will come up on your screen. Do you see what's on your screen?

(Government's Exhibit Number 109 was received.)

A Yes.

Q We'll just try to make it a little bit bigger here. Is this one of the photographs that you showed Mr. Manrich?

A Yes.

Q If you could describe to the jury, did you show him this sheet exactly how it is, or did you cover up any portion of it?

A No. I covered up everything below the photo, like with the details, the camera name, and the captured time, that sort of thing, and just showed him a photo of the vehicle in front of Majestic.

* * *

[164–168]

[CROSS-EXAMINATION OF
ROBERT E. GUYNN]

[BY MR. CROWE:]

Q I'm going to happened you what will be marked again for identification as Defendant Ocasio Exhibit 8, and I'm just looking for a fairly quick answer on this.

What I have done is I have labeled the reports A through N. Does it appear that Mr. Moreno was interviewed mostly in person on two occasions by telephone by you, by you and Mr. Smith, sometimes in the company of one or both of the Assistant United States Attorneys approximately 14 times?

(Defendant Ocasio's Exhibit Number 8
was marked for identification.)

A That sounds about right.

Q If that sounds about right, that's good enough. We don't need to take the jury's time with that.

Now did Mr. Moreno tell the FBI that Mr. Ocasio had recruited two police officers to join in the scheme?

A Yes.

Q What were the names of those two police officers?

A Andre Hibler and Victor Reillo.

Q He told that to the FBI on at least two or three occasions, did he not?

A I know he told them on at least one occasion that he thought they Samuel Ocasio recruited Victor Reillo and Andre Hibler.

Q If you would perhaps look at the report that you prepared for the March 21 initial interview.

A Yes.

Q On page 147, do you see that he reported that, do you see that he reported that on that occasion?

A Yes.

Q If you would look at the report that I believe that I have labeled number E. I can't read my writing. It's either 135 or 139. Let me check. It would be 139.

Do you see that he again stated that Mr. Ocasio had recruited those two officers, Reillo and Hibler to participate in the scheme?

A Yes.

Q There has been testimony about Mr. Reillo in this case. Do you recall that, Officer Reillo?

A Yes.

Q He was the officer whose car was I think in a one car accident that got towed from the Southwest District in Baltimore City?

A Correct.

Q Do you recall what Mr. Moreno said about Mr. Hibler when I asked if he had ever, if Mr. Ocasio had recruited Mr. Hibler?

A Mr. Moreno said he didn't know Mr. Hibler, I think is what he said.

Q He said he didn't know who Mr. Hibler was, but he certainly gave you the name of Andre Hibler in two interviews, did he not?

A Right.

Q Similarly, did Mr. Ocasio tell the Bureau on at least two occasions, without equivocation, that the person who had recruited Mr. Ocasio and brought him into this scheme was the Officer Leonel Rodriguez?

A Yes. Two occasions he said that, and the third occasion I think he clarified that he thought it was Rodriguez because him and Ocasio had been in contact with a lot.

Q Was that third occasion prompted by an indication from you or somebody in the U.S. Attorney's Office and the law enforcement that hey, Rodriguez said —

MS. KELLY: Objection, Your Honor. He's indicating what Rodriguez said, and I would rather the question not get out before what Rodriguez said.

THE COURT: That's not the way I heard it, but why don't you come up to the bench.

(Counsel approached the bench
and the following ensued.)

THE COURT: What was your question, Mr. Crowe?

MR. CROWE: The question was essentially did Mr. Moreno change his mind after he was told that Rodriguez said that he had not recruited, that he had not recruited —

MS. GAVIN: They can hear.

THE COURT: I'm sorry?

MS. GAVIN: I thought they were saying they could hear.

THE COURT: Hold on a second.

MS. GAVIN: The jury is talking. I thought they were saying they could hear.

THE COURT: I'm sorry.

MR. CROWE: The question was did Moreno say that he was not sure that it was Rodriguez after he was told that Rodriguez said I didn't do it?

THE COURT: Told by the government? I don't see anything wrong with the question.

MS. KELLY: I think it's a back door to get in hearsay from Rodriguez.

THE COURT: I think it's a way to suggest that he is tailoring his testimony to what the government wants him to say.

(Counsel returned to the trial tables.)

* * *

[170–175]

THE COURT: Okay. So again, subject to, of course, checking exhibits, the government's case is done?

MS. KELLY: Yes, Your Honor.

THE COURT: Defense have any motions?

MR. MARR: Your Honor, the Court please, on behalf of the defendant, Kelvin Manrich, I move for a judgment of acquittal, and I place that on the record. I have no further argument.

THE COURT: All right. Thank you.

Mr. Crowe.

MR. CROWE: Your Honor, on behalf of my client, I also make a motion for judgment of acquittal, both on the conspiracy count and all of the substantive counts. I think even taking all inferences in favor of the government, the government still has not made out a prima facie case.

With respect to the conspiracy count, in particular, we have raised the issue in the *Brock* case.

The *Brock* case has that certainly a conspiracy to commit a 1951(a) violation has to be something indicating that money came from another.

The indictment in this case charges that the proceeds from the conspiracy were extracted from three people. That is Moreno, Mejia, and Majestic.

I think the fact that the indictment has the two individuals, as well as the company, which was solely a creature, is enough to distinguish it from other cases which do not agree with *Brock*.

I'm sure the Court has also read the Fourth Circuit's opinion in *Medford*, which kind of ducks the issue, because the indictment did not say that the source of the money was part of the conspiracy. It had not been raised below. Therefore, based on plain error —

THE COURT: I'm sorry. I'm having a little trouble hearing you.

MR. CROWE: Based on the plain error analysis, that it wasn't going to look any further in the question. So there's clearly no Fourth Circuit law on that.

Although the argument is a little more strained as to a substantive count, we believe that for a 1951(a) conviction, it also has to be money which was extracted from somebody, you know, from somebody else who is not part of the conspiracy.

In that context, I would point out that the indictment is a little bit peculiar, in that it charges, my recollection is that in all the substantive counts, it charges that the money was extorted from Moreno, not from Moreno or Mejia or Majestic, but simply from Moreno. Mr. Moreno was clearly part of the conspiracy.

THE CLERK: Excuse me.

(Pause.)

THE COURT: All right. You may continue.

MR. CROWE: One final point is that Count 7 I believe is the count which deals with the car that involved Latitia Neal. I don't see any interstate commerce there. The car was simply towed to Majestic. The car was deemed total. There was nothing done with the car other than to give it back.

You almost have to go to a case like *Wickard versus Filburn* to find there is so little interstate commerce. Thank you, Your Honor.

THE COURT: All right. Thank you.

Would the government like to respond?

MS. GAVIN: Yes, Your Honor. The government would refer obviously the Court to the argument made in the motion in limine at the beginning of this case with respect to the *Brock* decision and why that case has not been followed in this circuit, or I believe anywhere else, and that it is simply not applicable in this district to this case.

I would also point out that with respect to the substantive counts, the defendants are each charged also with aiding and abetting, which I think also certainly, under the *Evans* case, makes it very clear that an individual can be charged in this way. The payor can also be charged with the substantive count of extortion here under both the direct and aiding and abetting in the substantive counts.

So we would refer the Court to that, as well as the arguments made in the motion in limine.

THE COURT: All right. Thank you.

Well, I do appreciate that the issue was raised in advance in limine, so I have looked at the cases. I think certainly as to the substantive counts, even if one otherwise agreed with the reasoning in *Brock*, it is hard to extend that to the substantive counts, particularly in light of the Supreme Court's holding in *Evans versus United States*.

The Fourth Circuit did have a chance to rule on this recently, but found it not necessary in the *Medford* case because there were other people or other entities at least not charged in the conspiracy from which money had been taken. So we don't have a recent decision of the Fourth Circuit.

We do have Judge Bennett's opinion in the *Curry* case and a case from the District of Alaska, and an older Fourth Circuit case, that all would appear to reject the argument or the decision in *Brock*.

I think we also do have in this case something very similar to the earlier — I think it's the *Spitler* case — the earlier Fourth Circuit case which was discussed in *Brock*, and it found distinguishable because in that case, there was a company which was actually the source of the payment. Even though it was a similar situation I think to this, where it was a high level agent or employee of the company that was taking the company money and using it to make the payments, the Sixth Circuit in *Brock*, therefore, found that to distinguish the *Spitler* case. I think that's very similar to what we have here.

Regarding Count 7, the interstate commerce, the effect on interstate commerce, of course, that has to be shown as minimal. I do believe there is sufficient evidence in the case for the jury to find that that fairly low threshold has been met, if they choose to do so.

So at this point, I am denying the motions for judgment on all counts.

In terms of proceeding from here, we can take a short break.

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v.

SAMUEL OCASIO, et al.
Defendants.

CRIMINAL No. CCB-11-0122

JURY TRIAL DAY 6

Before: The Honorable Catherine C. Blake
United States District Judge

Baltimore, Maryland

February 23 2012

* * *

[23–29]

[DIRECT EXAMINATION OF JAVIER CONDE]

BY MR. CROWE:

Q Officer Conde, I understand that you are an officer with the Baltimore City Police Department; is that correct?

A Yes, sir.

Q How long have you been with the department?

A For five years.

Q After graduating from the academy, have you had a single assignment?

A Yes, sir. I have been assigned to the Central District, located on the 400 block of East Baltimore street.

Q That's within a fairly easy walking distance of this courthouse; is that correct?

A Like ten blocks.

Q That's essentially the downtown area; is that correct?

A Yes, sir.

Q Where were you employed before you became a member of the Baltimore City Police Department?

A I was a police officer in the Puerto Rico Police Department.

Q Is the Puerto Rico Police Department a police department which essentially covers the entire Commonwealth of Puerto Rico?

A Yes, sir.

Q So it would be comparable to a state police department; is that right?

A Yes, sir.

Q What rank did you have in that department?

A The moment I resigned, before I came to Baltimore, I was a lieutenant.

Q Do you know my client, Samuel Ocasio?

A Yes, sir.

Q How did you come to meet Mr. Ocasio?

A First I met Ocasio in Puerto Rico. When Baltimore went to recruit officers, we find a person to help us with the English language. That's where I met him. We were taking English classes together.

Q Did you understand that you both were taking English classes because you wanted to qualify to come to the United States and work on the Baltimore City Police Department?

A Yes, sir.

Q What has been the nature of your relationship with Mr. Ocasio in the United States?

A Since I met him, we came here, we become friend. At this moment, he is my kid godfather.

Q Do you and your family do things together?

A Yes, sir.

Q Now have you had the opportunity to interact and work him directly as a police officer?

A No. We work in different places, different assignments.

Q Have you had the opportunity to interact with him outside the police department?

A Yes. We are members of the same church.

Q Do you also know other people who know Mr. Ocasio?

A Yes, sir.

Q Could you tell us what different types of groups of people those would be?

MS. GAVIN: Objection, Your Honor.

THE COURT: Do you want to come up and tell me where it's going?

(Counsel approached the bench and the following ensued.)

MR. CROWE: I don't understand the objection.

THE COURT: You want to start with that?

MS. GAVIN: Your Honor, I think it is getting way beyond the scope of the rule. I mean he has established he knows him, he knows him in the community. I assume the next question will be what's your opinion as to his representation or are you aware of it? But to just start going into who the other people are that might know him, and how they know him, I think is going way beyond that.

MR. CROWE: Well, I have to establish the communities.

THE COURT: He is going to be one of the character witnesses?

MR. CROWE: Yes.

THE COURT: What kind of answer are you expecting?

MR. CROWE: He is saying he knows him through the church and other Hispanic people in Harford County. He also knows him through other police officers. He knows other police officers, some of whom are members of the church and some of whom are not.

THE COURT: Okay. Fine. Thank you.

(Counsel returned to the trial tables.)

BY MR. CROWE:

Q What groups of people do you know who know Mr. Ocasio?

A Most of the people I know are members of the church, that attend the church, different professions, including other police officer.

Q So there are police officers within the church; is that correct?

A Yes, sir.

Q Including members of the Baltimore City Police Department?

A Yes, sir.

Q Do you also know officers who know Mr. Ocasio outside the church?

A Yes, sir.

Q Could you give us the name of the church? I should have asked that to begin with.

MS. GAVIN: Objection, Your Honor.

THE COURT: Overruled.

A The name of the church, it is Spanish, Sendero de la Cruz.

Q Does that mean Way of the Cross?

A Yes, sir.

Q Are you familiar with Mr. Ocasio's representation among church members, both those who are and are not associated with law enforcement?

A Yes, sir.

Q Are you familiar with his reputation among law enforcement officers, both those who are members of the church and those who are not?

A Yes, sir.

Q Among the church members, what is Mr. Ocasio's reputation for being an honest person?

A All the members see him as an honest person, and they have a lot of respect for him.

Q What's his reputation for obeying the law, if you know?

A I never heard anything bad about him in terms of violation of the law by other members.

Q Among the law enforcement officers that you know, what is his reputation for being a police officer who acts in a lawful manner?

A To my knowledge, he was a good officer who was doing his job according to the rules.

Q That's his reputation; is that correct?

A Yes, sir.

Q Now the questions so far have dealt with your knowledge of his reputation among these two groups. Are those your opinions as well?

A In my opinion, I never heard before any type of incident involving him or any type of violation.

Q Well, do you have an opinion as to whether or not he would betray his office as a Baltimore City police officer for money?

MS. GAVIN: Objection, Your Honor.

THE COURT: Sustained.

Q What is your opinion as to his integrity?

A In my opinion, his integrity, he's a good person, and honest.

MR. CROWE: Thank you.

MS. GAVIN: No questions, Your Honor.

THE COURT: Thank you very much, sir. You're excused.

* * *

[35–36]

[DIRECT EXAMINATION OF
JAVIER CONDE]

[BY MR. CROWE:]

Q Had you had the opportunity to work with Mr. Ocasio during the time he was a police officer?

A No.

Q Is that because you were in different districts?

A Yes.

Q But do you know others who know Mr. Ocasio?

A Oh, yes, sir.

Q What type of people are these that you know who know Mr. Ocasio?

A Well, besides officers? Members of the church, pastor, my wife, quite a number of people. We all go to visit other churches, so related to them.

Q So there are law enforcement officers who are members of the church. This is up in Harford County; is that right?

A Yes, sir.

Q Are you familiar with Mr. Ocasio's reputation both in the Harford County Hispanic community, the church?

A Yes.

Q And among the smaller group of Baltimore Police Department officers who are members of the church?

A Yes.

Q What is his reputation generally among church members for being honest?

A Well, if you put it on a scale from one to ten, ten being, you know, perfect, I would say ten.

Q What is his reputation for being a law-abiding person?

A Good.

Q What is his reputation among police officers who are members of the congregation for being an honest person?

A He is outstanding on that.

Q I'm sorry. Did you say outstanding?

A Yeah, I did.

Q What is his reputation among them for being a law-abiding police officer?

A It's good.

Q What we have been talking about, and this is a legal distinction, is his reputation among other people.

A Uh-huh.

Q You told us what his reputation is among other people.

A Uh-huh.

Q Are those your opinions as well?

A Yes. So far he's a great person.

MR. CROWE: Thank you very much.

THE WITNESS: You're welcome.

* * *

[43–45]

[DIRECT EXAMINATION OF
WILSON SOTO]

BY MR. CROWE:

Q Perhaps I can ask this question. Can you tell the members, can you tell Judge Blake and the members of the jury about how much time per week Mr. Ocasio spends preparing for leading the youth activities?

MS. GAVIN: Your Honor, I'm going to object.

THE COURT: I'm going to sustain that. If it's time that he spends with this gentleman that you want to bring out, that's one thing.

Q Well, have you had the opportunity to interact with Mr. Ocasio directly?

A Yes, sir.

Q Have you had the opportunity to interact with him directly in his activities as a youth counselor?

A Yes, sir.

Q Do you know other people who know Mr. Ocasio?

A Yes, sir.

Q Are those members, are those largely members of the church?

A Yes, sir.

Q Without giving any specific names, can you tell us the numbers of the members of church who are either past or present law enforcement officers?

A Well, we have about seven or six families approximately that are police families.

Q Are you familiar with Mr. Ocasio's reputation both among the general members of the church and the smaller set of members who are associated with law enforcement?

A Yes, sir.

Q What is Mr. Ocasio's reputation both among the church members and the smaller group of law enforcement officers, assuming that it is the same for being an honest and law-abiding person?

A Well, from the time I have known Mr. Ocasio, he has always been a person that respects others. He is very cordial, respectful. He is a happy person that brings harmony and also harmony to the group, and he is a family person.

Q So would you say that his reputation for being honest and law-abiding is good?

A Yes, sir.

Q We technically have been talking about your knowledge of his reputation. Do you share — in your opinion, is that reputation well-deserved?

A Yes, sir.

* * *

[46]

THE COURT: Okay. Then we are at the conclusion of all the evidence in the case.

Mr. Crowe, I assume you are renewing your motion?

MR. CROWE: We renew the motion for judgment of acquittal on the grounds previously stated.

THE COURT: All right. For the same reasons as previously stated, I am denying your motions. I am specifically rejecting the *Brock* argument in the context of this case. I think there is sufficient evidence as to all the elements of the four offenses to go forward to the jury.

* * *

[67–72]

[THE COURT:]

Now the defendant is charged in Count 1 with conspiracy to violate federal law. The relevant statute, the law on this subject is called, it's referenced to the Code, 18 U.S.C., Section 371. The Code provides that if two or more persons conspire, which is essentially agree, to commit any offense against the United States, and one or more of such

persons does any act to effect, to carry out the object of the conspiracy, each is guilty of an offense against the United States.

Now to satisfy its burden of proof on Count 1, the conspiracy charge, the government has to establish each of the following four essential elements beyond a reasonable doubt:

First, that two or more persons entered the unlawful agreement that is charged in the indictment, starting in or about the spring of 2008, and this is the agreement to commit extortion under color of official right.

Second, that the defendant, Mr. Ocasio, knowingly and willfully became a member of that conspiracy.

Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and fourth, that the overt act, which you find to have been committed, was done to further some objective of the conspiracy.

I'm going to define those more thoroughly.

First of all, a person acts knowingly if he acts intentionally and voluntarily, not because of ignorance, mistake, accident or carelessness. Whether the defendant acted knowingly may be proven by his conduct and by all the facts and circumstances surrounding the case.

To act willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with a bad purpose to disobey or disregard the law. Again, a

defendant's conduct is not willful if it's due to negligence or inadvertence or mistake.

So the first element the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the unlawful agreement charged in the indictment.

In order for the government to satisfy this element, you don't have to find that the alleged members of the conspiracy met together and entered into any express or formal agreement. You don't have to find that the alleged conspirators stated in words or writing what the scheme was, its object or purpose, or every precise detail of the scheme, or the means by which its object or purpose was to be accomplished. But the government must prove that there was a mutual understanding, whether spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act.

Now you may find that the existence of an agreement to disobey or disregard the law has been established by direct proof. However, because conspiracy by its very nature is characterized by secrecy, you may also infer, you may conclude that it exists based on the circumstances of the case and the conduct of the parties involved.

In a real, real sense then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may, in deciding whether an agreement existed here, consider the actions and statements of all those people you find to be participants in the conspiracy as proof that a

common design existed on the part of the persons charged to act together to accomplish an unlawful purpose.

Now the second element the government has to prove beyond a reasonable doubt is that the defendant, Mr. Ocasio, knowingly, willfully, and voluntarily became a member of the conspiracy. So if you are satisfied that the conspiracy, the unlawful agreement charged in the indictment, existed, you must next ask yourselves who the members of the conspiracy were.

In deciding whether the defendant, Mr. Ocasio, was in fact a member of the conspiracy, you should consider whether he knowingly and willfully joined it. Did he participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as an associate or a worker?

It is sometime said that in order for a defendant to be deemed a participant in a conspiracy, he must have had some stake in the venture or its outcome. I'm instructing you that while proof of a financial interest in the outcome of the scheme is not essential, if you find the defendant had such an interest, that's a factor you may properly consider in deciding whether or not he was a member of the conspiracy charged in the indictment.

As I just mentioned, before a defendant can be found to have been a conspirator, you must find he knowingly joined in the unlawful agreement or plan. So the key question is whether he joined the

conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement.

It's important to note that the defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of the other alleged co-conspirators and, again, the reasonable inferences or conclusions that you may draw from those acts or statements.

The defendant's knowledge is a matter of inference. It's a matter for you to conclude or decide based on the facts proved. I will instruct you that to become a member of a conspiracy, the defendant need not have known the identities of each and every other member, nor does he have to have been aware of all of their activities. He need not have been fully informed as to all the details or the scope of the conspiracy in order to justify an inference of knowledge on his part, and he does not have to have joined in all the conspiracy's unlawful objectives.

The extent of a defendant's participation has no bearing on the issue of his guilt. A conspirator's liability is not measured by the extent or the duration of his participation, because each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles. Others play minor parts in the scheme. An equal role is not what the law requires. Even a single act may be enough to draw a defendant within the scope of the conspiracy.

I do want to caution you, however, a defendant's mere presence at the scene of an alleged crime does

not by itself make him a member of the conspiracy. Mere association with one or more members of the conspiracy does not automatically make the defendant a member, because a person may know or be friendly with a criminal without being a criminal himself.

Mere similarity of conduct, or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish membership in the conspiracy.

I also need to caution you that mere knowledge or acquiescence, without participation in the unlawful plan, is not sufficient, or the fact that the actions of a defendant, without knowledge, nearly happened to further the purposes or objectives of the conspiracy doesn't make the defendant a member. More is required under the law. It is necessary that the defendant had participated with knowledge of at least some of the purposes or objectives of the conspiracy, and with the intention of aiding in the accomplishment of those unlawful ends.

* * *

[96–99]

[MS. GAVIN:]

Those elements, I would submit to you, most of them are really not an issue here. There is no real issue that he was a police officer at the time of the events that you heard about. There is no real issue that that is a public official, as the judge has already indicated.

There is no real issue either, ladies and gentlemen, about the interstate commerce element that you heard about. Just briefly, when you go back in the jury room, take a look at Government's Exhibit 57A, and you will see that is the check from GEICO, drawn on an account coming from Fredericksburg.

Wonderful. Now we have something for you to look at as well.

But you will see that check, and you will see it from Fredericksburg, Virginia.

Take a look at Government's Exhibit 26, which is the Majestic file for Markel Taylor's car. You go through that file back in the jury room, and you will see again another check, this one made payable to Markel Taylor and Majestic Auto Body for the repairs to his car. That check came from a bank, you will see, called National City Bank in Ohio.

Those checks is one example of the effect on interstate commerce, money coming from out of state, going into the bank account at Majestic. That's all you need to find.

Likewise, for some of the elements under conspiracy, whether there was an agreement of two or more people to pay police officers to send cars, I will submit to you, ladies and gentlemen, there is no real dispute there either.

You heard from Alex Moreno. You heard from his brother. You heard telephone calls, repeated calls from multiple people discussing the sending of cars in exchange for money. That's all evidence of an agreement.

The overt acts that you heard about in the instructions, again I submit there is no real issue with those, whether those occurred. You heard them on the tapes, the telephone calls. Those are the overt acts.

What this case really boils down to, and what you all need to decide, is whether this defendant, Samuel Ocasio, knowingly became a member of that conspiracy. Did he knowingly agree by his actions to take money from Majestic in exchange for sending cars, and did he do it knowing he was getting the money because he was a police officer?

The answer to that, based on the evidence that you heard, ladies and gentlemen, is absolutely yes, he did, and that evidence is really not very complicated. It's actually quite straightforward.

You recall at the beginning of the trial, when Ms. Kelly was speaking to you in opening, she put up this chart to explain what the scheme was, and the evidence that you heard supports this in every respect.

The police officer is Samuel Ocasio, and there are other police officers that you heard about that you also can consider their conduct in determining whether they were part of the conspiracy and whether there was a conspiracy, as the judge has instructed you.

But it's really quite simple, a phone call. Someone calls 911 or 311 that they need help with an accident. The police officer is dispatched, and you saw the CADs, you will recall, and the records of police officers being sent to the accident.

Then as you saw on the incident summaries that Special Agent Guynn went over yesterday, all ten of them, every single time, every single incident there is a call or a text from the police officer, or a police officer at the scene to Alex Moreno, and every single time Alex Moreno or a tow truck — sometimes he would drive, sometimes the truck comes to the accident — the car ends up back at Majestic, and every time insurance money, or sometimes just the tow bill or something like that comes to Majestic.

* * * *

JURY INSTRUCTIONS
Feb. 24, 2012 **USA v. Samuel Ocasio**
Criminal No. CCV-11-0122

MEMBERS OF THE JURY:

At the outset, I want to thank you for your patience and attention throughout this case, your care in the consideration of the testimonial and documentary evidence, your patience in the matter of recesses and delays when it has been necessary for me to hear counsel out of your presence, and your promptness, making it possible to start each session on time and to resume sessions after recesses without delay.

As you already know, the functions of the Judge and of the Jury are quite different. It is my duty as Judge to instruct you as to the law which applies to this case. It is your duty to decide the facts and, in deciding these facts, to comply with the rules of law and apply them as I state them to you without regard to what you think the law is or should be.

You should not single out any one sentence or individual point in these instructions and ignore the others. Rather, you are to consider all of the instructions as a whole, and you are to consider each instruction in light of all the others. Counsel may quite properly refer to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the court in these instructions, you are of course to be governed by the court's instructions.

The case is important to the Government, for the enforcement of criminal laws is a matter of prime concern for the community. Equally, it is important to the defendant, who is charged with a serious crime.

The fact that the prosecution is brought in the name of the United States of America entitles the Government to no greater or lesser consideration than that accorded to the defendant.

You and only you are the judges of the facts. If any expression of mine or anything I may or may not have done or said would seem to indicate any opinion relating to any factual matters, I instruct you to disregard it.

In deciding the facts, you may consider not only any evidence to which I may refer, and the evidence to which you may be referred by counsel in their arguments, but you may also consider any testimony or exhibits in the case, whether or not referred to by me or by counsel, which you believe to be important to your decision.

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence.

It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about the defendant's race, religion, national origin, sex or age. All persons are entitled to the presumption of innocence and the government has the burden of proof, as I will discuss in a moment.

It would be equally improper for you to allow any feelings you might have about the nature of the crime charged to interfere with your decisionmaking process.

Under your oath as jurors, you are not to be swayed by prejudice or by sympathy. You are to be guided solely by the evidence in this case, and the question you must ask yourselves as you sift through the evidence is: Has the government proven the guilt of the defendant beyond a reasonable doubt?

It is for you alone to decide whether the government has proven that the defendant is guilty of the crime charged solely on the basis of the evidence and subject to the law as I charge you. It must be clear to you that once you let fear, or prejudice, or bias, or sympathy interfere with your thinking there is a risk that you will not arrive at a true and just verdict.

If you have a reasonable doubt as to a defendant's guilt, you should not hesitate for any reason to find a verdict of not guilty. But on the other hand, if you should find that the government has met its burden of proving a defendant's guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to render a verdict of guilty.

The statements, objections, and arguments of counsel are not evidence and should not be considered as evidence. The evidence in the case consists of the sworn testimony of the witnesses, regardless of who may have called them, all exhibits received in evidence, regardless of who may have

produced them. Any evidence as to which an objection was sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded. Anything you may have seen or heard outside the courtroom including any newspaper or media publicity of any kind is not evidence, and must be entirely disregarded.

A number of exhibits have been admitted into evidence in this case and will be available for your review. You may consider them for any purpose consistent with these instructions that will assist you in evaluating the merits of this case and you should give them the weight and credibility that you deem appropriate.

At times throughout the trial, I have been called upon to rule on the admissibility of certain offered evidence. It is the duty of the attorney for each side to object when the other side offers testimony or other evidence that the attorney believes is not properly admissible. You should not show any prejudice against an attorney or his client because the attorney objected to the admissibility of evidence, or asked for a conference out of the hearing of the jury or asked the Court for a ruling of the law.

You also should not be concerned with my rulings on objections or the reasons for them. Whether evidence which has been offered is admissible or is not admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference. In admitting evidence, to which an objection has been made, I do not determine what weight should be given to such evidence; that is entirely up to you. You must not guess what the

answer might have been to any question to which an objection was sustained, and you must not speculate as to the reason the question was asked or the reason for the objection.

Let me reemphasize that a lawyer's question to a witness is not evidence. At times, a lawyer may have incorporated into a question a statement which assumed certain facts to be true and asked the witness if the statement was true. If the witness denies the truth of a statement, and if there is no evidence in the record proving that the assumed fact is true, then you may not consider the fact to be true simply because it was contained in the lawyer's question.

In short, questions are not evidence; answers are.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence —such as the testimony of an eyewitness. The other type of evidence is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

There is a simple example of circumstantial evidence which is often used. Assume that when you came into the courthouse this morning the sun was shining. As you were sitting here, someone walked in with an umbrella that was dripping wet. Someone else then walked in with a raincoat that was also dripping wet. You cannot look outside of the courtroom; consequently, you have no direct evidence

of whether or not it is raining. But, on the combination of facts, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to the definition of circumstantial evidence. You infer on the basis of reason and experience from an established fact the existence or the nonexistence of some other fact. Circumstantial evidence is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with all the evidence in the case that you find persuasive, both direct and circumstantial.

You are to consider only the evidence presented, and you may not guess or speculate as to the existence of any facts in this case. But in your consideration of the evidence, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence in the case.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You are not required to believe any witness even though his or her testimony is uncontradicted. In determining whether or not to believe a witness, you should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence

which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and his or her demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case and the manner in which each witness might be affected by the verdict. Ask yourself whether the witness has some incentive or loyalty that might cause him or her to shade the truth; or, does the witness have some bias, prejudice, or hostility that may have caused the witness to give you something other than a completely accurate account of the facts? Consider the extent to which, if at all, the testimony of each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, should be considered by you, but, in weighing their effect, you should consider whether the inconsistencies or discrepancies relate to a matter of importance or an unimportant detail, and whether the discrepancy or inconsistency results from innocent error or willful falsehood.

You have heard the testimony of law enforcement officials. The fact that a witness may be employed by the federal, state, or local government as a law enforcement official does not mean that his testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be affected by a personal or professional interest in the outcome of the case. It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give that testimony whatever weight, if any, you find it deserves.

After you have considered all of the factors bearing upon the credibility of a witness which I have mentioned to you, you may decide to accept all of the testimony of a particular witness, none of the testimony of a particular witness, or part of the testimony of a particular witness. In other words, you may give the testimony of any witness such credibility and weight, if any, as you may think it deserves.

The government has offered evidence in the form of audio recordings of intercepted phone conversations and text messages. All of these recordings were made without the knowledge of the defendant, but with the prior authorization of a court. The use of this procedure to gather evidence is perfectly lawful, and the government is entitled to use the tape recordings in this case.

The parties have been permitted to hand out typed documents, transcripts of recordings, containing their interpretation of what appears on the tape recordings which have been received as evidence. Those were given to you as an aid or guide to assist you in listening to the tapes. In regard to the English language conversations, however, the transcripts are not in and of themselves evidence. Therefore, when the tapes were played, I advised you to listen very carefully to the tapes themselves. You alone should make your own interpretation of what appears on the tapes based on what you heard. If you think you heard something differently than appeared on the transcript then what you heard is controlling.

As to the Spanish language recordings, however, the translations are the evidence.

You have heard from witnesses who testified that they were actually involved in the conspiracies charged in the indictment and from witnesses who have plea agreements with the government. The government may argue, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others. For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices, or so-called cooperators, may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

However, it is also the case that accomplice or cooperator testimony is of such nature that it must

be scrutinized with great care and viewed with particular caution when you decide how much of that testimony to believe.

You should ask yourselves whether these so-called accomplices or cooperators would benefit more by lying, or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth?

Similarly, you should bear in mind that a witness who has entered into a plea agreement has an interest in this case different from any ordinary witness. A witness who realizes that he may be able to obtain his own freedom, or receive a lighter sentence by giving testimony favorable to the prosecution, may have a motive to testify falsely. Therefore, you must examine his testimony with caution and weigh it with great care. In sum, you should look at all of the evidence in deciding what credibility and what weight, if any, you will want to give to the accomplice or cooperator witnesses.

There has been evidence introduced at trial that the government called as a witness a person who was using (or addicted to) drugs or alcohol when the events he observed took place. I instruct you that there is nothing improper about calling such a witness to testify about events within his personal knowledge.

On the other hand, his testimony must be examined with greater scrutiny than the testimony of any other witness. The testimony of a witness who was using drugs or alcohol at the time of the events he is testifying about may be less believable because of the effect the drugs may have on his or her ability to perceive or relate the events in question.

If you decide to accept his testimony, after considering it in light of all the evidence in this case, then you may give it whatever weight, if any, you find it deserves.

The defendant begins the trial here with a clean slate. This presumption of innocence alone is sufficient to acquit a defendant unless you, after a careful and impartial consideration of all the evidence, are unanimously convinced beyond a reasonable doubt of the defendant's guilt. This burden never shifts to the defendant for the simple reason that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence. Note that the government's burden is not to prove guilt beyond all possible doubt, but rather beyond a reasonable doubt. If the Government fails to sustain this burden, you must find the defendant not guilty.

The defendant did not testify in this case. Under our Constitution, the defendant has no obligation to testify or to present any other evidence because it is the government's burden to prove the defendant guilty beyond a reasonable doubt. That burden remains with the prosecution throughout the entire trial and never shifts to the defendant. A defendant is never required to prove that he is innocent.

You may not attach any significance to the fact that the defendant did not testify. No adverse inference against him may be drawn by you because he did not take the witness stand. You may not consider this against the defendant in any way in your deliberations in the jury room.

The question of possible punishment of the defendant is of no concern to you and should not, in any sense, enter into or influence your deliberations. The duty of imposing sentence, if a defendant is convicted, rests exclusively upon the court. Similarly, the possible consequences of a not guilty verdict are of no concern to you. Your duty is to weigh the evidence in the case and to determine whether or not the defendant is guilty beyond a reasonable doubt, solely upon the basis of the evidence.

The defendant has offered evidence in the form of reputation for honesty and integrity. You should consider such evidence along with all the other evidence in the case.

Evidence in the form of reputation for honesty and integrity may be sufficient to raise a reasonable doubt whether the defendant is guilty, because you may think it improbable that a person of honesty and integrity would commit such a crime. Evidence in the form of reputation of a defendant's honesty and integrity may be inconsistent with those traits of character ordinarily involved in the commission of the crime charged, and may give rise to a reasonable doubt. That is for you to decide after considering all the evidence.

With these preliminary instructions in mind, let us turn to the charges against the defendant, as contained in the indictment. I remind you that an indictment itself is not evidence or proof of any kind. It merely describes the charges made against the defendant. There are four counts before you, and each must be considered separately. Your verdict as to one count does not determine your verdict as to the other counts.

You may not draw any inference, favorable or unfavorable, towards the government or the defendant on trial, from the fact that certain persons were not named as defendants in the indictment or that certain persons are not currently on trial with the defendant. These circumstances must play no part in your deliberations. Whether a person should be named as a co-conspirator or indicted as a defendant, and when, or whether, that person may go to trial, is a matter within the sole discretion of the United States Attorney, the grand jury, and the court. Therefore, you may not consider it in any way in reaching your verdict as to the defendant on trial. Similarly, the fact that one or more of the persons alleged to be involved in these crimes have chosen to plead guilty is not in itself evidence of any kind concerning this defendant who has chosen to deny that he is guilty and proceed to trial.

You will note that the indictment charges that the offenses were committed between or "approximately" on certain dates. The proof need not establish with certainty the exact dates of the alleged offense. It is sufficient if the evidence in this case establishes beyond a reasonable doubt that the

offenses were committed on or between dates reasonably near the dates or time frame alleged.

The defendant is charged in Count One of the Indictment with conspiracy to violate federal law. The relevant statute on this subject is 18 U.S.C. § 371. It provides:

> If two or more persons conspire to commit any offense against the United States and one or more of such persons do any act to effect the object of the conspiracy, each [is guilty of an offense against the United States].

In order to satisfy its burden of proof, the government must establish each of the following four essential elements beyond a reasonable doubt:

First, that two or more persons entered the unlawful agreement charged in the indictment starting in or about the Spring of 2008, that is, the agreement to commit extortion under color of official right;

Second, that the defendant knowingly and willfully became a member of the conspiracy;

Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and

Fourth, that the overt act(s) which you find to have been committed was (were) committed to further some objective of the conspiracy.

A person acts knowingly if he acts intentionally and voluntarily, and not because of ignorance, mistake, accident, or carelessness. Whether the

defendant acted knowingly may be proven by the defendant's conduct and by all of the facts and circumstances surrounding the case.

To act "willfully" means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or disregard the law.

The defendant's conduct was not "willful" if it was due to negligence, inadvertence or mistake.

The first element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered the unlawful agreement charged in the indictment.

In order for the government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or every precise detail of the scheme or the means by which its object or purpose was to be accomplished. What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act.

You may, of course, find that the existence of an agreement to disobey or disregard the law has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the

circumstances of this case and the conduct of the parties involved.

In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words. In this regard, you may, in determining whether an agreement existed here, consider the actions and statements of all of those you find to be participants as proof that a common design existed on the part of the persons charged to act together to accomplish an unlawful purpose.

The second element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that the defendant knowingly, willfully and voluntarily became a member of the conspiracy.

If you are satisfied that the conspiracy charged in the indictment existed, you must next ask yourselves who the members of that conspiracy were. In deciding whether the defendant whom you are considering was, in fact, a member of the conspiracy, you should consider whether the defendant knowingly and willfully joined the conspiracy. Did he participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective as an associate or worker?

In that regard, it has been said that in order for a defendant to be deemed a participant in a conspiracy, he must have had a stake in the venture or its outcome. You are instructed that, while proof of a financial interest in the outcome of a scheme is not essential, if you find that the defendant had such an interest, that is a factor which you may properly

consider in determining whether or not the defendant was a member of the conspiracy charged in the indictment.

As I mentioned a moment ago, before the defendant can be found to have been a conspirator, you must first find that he knowingly joined in the unlawful agreement or plan. The key question, therefore, is whether the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement.

It is important for you to note that the defendant's participation in the conspiracy must be established by independent evidence of his own acts or statements, as well as those of the other alleged co-conspirators, and the reasonable inferences which may be drawn from them.

The defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, the defendant need not have known the identities of each and every other member, nor need he have been apprised of all of their activities. Moreover, the defendant need not have been fully informed as to all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on his part. Furthermore, the defendant need not have joined in all of the conspiracy's unlawful objectives.

The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member

may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy.

I want to caution you, however, that the defendant's mere presence at the scene of the alleged crime does not, by itself, make him a member of the conspiracy. Similarly, mere association with one or more members of the conspiracy does not automatically make the defendant a member. A person may know, or be friendly with, a criminal, without being a criminal himself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish membership in the conspiracy.

I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

In sum, the defendant, with an understanding of the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for

the purpose of furthering the illegal undertaking. He thereby becomes a knowing and willing participant in the unlawful agreement-that is to say, a conspirator.

The third element which the government must prove beyond a reasonable doubt, to establish the offense of conspiracy, is that at least one of the overt acts charged in the indictment was knowingly committed by at least one of the conspirators, at or about the time and place alleged.

The indictment charges that the following overt acts were committed in the district of Maryland.

a. On or about December 14, 2010, at approximately 5:52 p.m., defendant Manrich called Moreno and told Moreno that he and another BPD officer were going to split a payment from Moreno for a vehicle that Manrich had sent to Majestic from a hit and run scene.

b. On or about January 15, 2011, defendant Ocasio called Moreno, but the call went to voice mail. Moreno immediately called Ocasio back and during that call, Ocasio stated that he needed a tow truck at Russell Street in front of the Holiday Inn.

c-h. [READ Counts Two through Seven, which are incorporated as overt acts.]

In order for the government to satisfy this element, it is not required that all of the overt acts alleged in the indictment be proven.

Similarly, you need not find that the defendant you are considering committed the overt act. It is sufficient for the government to show that one of the

conspirators knowingly committed an overt act in furtherance of the conspiracy, since such an act becomes, in the eyes of the law, the act of all of the members of the conspiracy.

You are further instructed that the overt act need not have been committed at precisely the time alleged in the indictment. It is sufficient if you are convinced beyond a reasonable doubt, that it occurred at or about the time and place stated.

Finally, you must find that either the agreement was formed or that an overt act was committed in the District of Maryland, which includes the entire state of Maryland.

The fourth, and final, element which the government must prove beyond a reasonable doubt is that the overt act was committed for the purpose of carrying out the unlawful agreement.

In order for the government to satisfy this element, it must prove, beyond a reasonable doubt, that at least one overt act was knowingly and willfully done, by at least one conspirator, in furtherance of some object or purpose of the conspiracy, as charged in the indictment. In this regard, you should .bear in mind that the overt act, standing alone, may be an innocent, lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme. You are therefore instructed that the overt act does not have to be an act which, in and of itself is criminal or constitutes an objective of the conspiracy.

You will recall that I have admitted into evidence against the defendant the acts and statements of others because these acts and statements were committed by persons who, the government charges, were also confederates or co-conspirators of the defendant on trial.

The reason for allowing this evidence to be received against the defendant has to do with the nature of the crime of conspiracy. A conspiracy is often referred to as a partnership in crime. Thus, as in other types of partnerships, when people enter into a conspiracy to accomplish an unlawful end, each and every member becomes an agent for the other conspirators in carrying out the conspiracy.

Accordingly, the reasonably foreseeable acts, declarations, statements and omissions of any member of the conspiracy and in furtherance of the common purpose of the conspiracy, are deemed, under the law, to be the acts of all of the members, and all of the members are responsible for such acts, declarations, statements and omissions.

If you find, beyond a reasonable doubt, that the defendant whose guilt you are considering was a member of the conspiracy charged in the indictment, then, any acts done or statements made in furtherance of the conspiracy by persons also found by you to have been members of that conspiracy, may be considered against that defendant. This is so even if such acts were done and statements were made in the defendant's absence and without his knowledge.

However, before you may consider the statements or acts of a co-conspirator in deciding the

issue of a defendant's guilt, you must first determine that the acts and statements were made during the existence, and in furtherance, of the unlawful scheme. If the acts were done or the statements made by someone whom you do not find to have been a member of the conspiracy or if they were not done or said in furtherance of the conspiracy, they may be considered by you as evidence only against the member who did or said them.

Mr. Manrich is no longer on trial with Mr. Ocasio. That fact alone must not affect your consideration of Mr. Ocasio in any way. Similarly, the statements that may have been made by Mr. Manrich after his arrest, whether to the unemployment claims adjuster or to SA Guynn do not involve Mr. Ocasio and may not be used against him in any way. However, if you find that Mr. Manrich was a member of the conspiracy with which Mr. Ocasio is charged, and that Mr. Ocasio also was a member of the conspiracy, you may consider any acts done by Mr. Manrich and any statements made by Mr. Manrich during the course of the conspiracy and in furtherance of the conspiracy in your determination as to whether the government has proved all the elements of the offenses charged against Mr. Ocasio.

Counts Five through Seven charge the defendant Ocasio with extortion under color of official right. Each Count reads as follows:

[Read Counts Five through Seven]

Section 1951 of Title 18 of the United States Code, in pertinent part, provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of an article or commodity in commerce, by extortion or attempts or conspires so to do, [commits a crime].

Extortion under color of official right is the use of one's position as a public official, or the authority of public office, to obtain money or services not due the official or his public office.

In order to meet its burden of proof, the government must establish beyond a reasonable doubt each of the following elements:

First, that the defendant was a public official, or held public office;

Second, that the defendant obtained property or services not due him or his office;

Third, that this property or service was given, with the consent of the giver, to the defendant, who knew that the property was given because of the power of the defendant's official position; and

Fourth, that interstate commerce, or an item moving in interstate commerce, was delayed, obstructed, or affected in any way or degree.

The first element that the government must prove beyond a reasonable doubt is that at the time of the events charged in the indictment, the defendant was a public official, or held public office. This would include a position as a Baltimore City police officer.

The second element which the government must prove beyond a reasonable doubt is that defendant

obtained money, goods, or services, which were not legitimately owed to the office the defendant represents.

The government *does* not have to prove that the items given were of personal benefit to "the defendant. However, the value of the goods or services may be considered in helping you determine the facts of the situation.

The government does have to prove, beyond a reasonable doubt, that the goods or services obtained were not due or owing the office which the defendant represents.

The third element which the government must prove beyond a reasonable doubt is that the defendant used the authority of his office or position to obtain the money, goods or services. That is, you must decide whether the defendant represented himself as capable of doing something, or of refusing to do something because of his official position.

To satisfy this element, the government must prove beyond a reasonable doubt the defendant obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts rather than being given voluntarily or unrelated to the defendant's office. The defendant need not have affirmatively induced the payments by his actions, but he must have known that the payment was offered in exchange for a specific exercise of his official powers. You do not have to determine whether the defendant could or did actually perform the service, or whether he actually had a duty to do so.

If you decide that the defendant was given money, goods or services not due the office he represents, you must then decide whether the defendant used the authority of his office or position to obtain the money, goods or services. The focus of your inquiry is whether the money, goods or services were given to the defendant because of the defendant's misuse of his position. The government must prove beyond a reasonable doubt that these items were given to the defendant in connection with his power and authority as a public official. The giver may have initiated this exchange, and the parties may be on friendly terms. These are factors to consider in deciding whether the giver gave the payments because he believed the defendant would use his office for acts not properly related to his official duty, or whether, instead, the giver was making a voluntary contribution.

Unless you decide, beyond a reasonable doubt, that the defendant knew the giver's consent was wrongfully obtained—that is, that the money, goods or services were given in connection with the defendant's misuse of his official position rather than being given voluntarily—you cannot convict the defendant.

If you decide that the defendant obtained another's property, under color of official right, you must then decide whether this action would affect interstate commerce in any way or degree. You must determine whether there is an actual or potential effect on commerce between any two or more states (*or* between one state and the District of Columbia *or* between a state and a U.S. Territory or possession *or*

on commerce within one state that goes through any place outside that state).

If you decide that there was any effect at all on interstate commerce, then that is enough to satisfy this element. The effect can be minimal. For example, if a payment to the defendant would prevent the use of those funds to purchase articles which travel through interstate commerce, that would be a sufficient effect on interstate commerce.

If you decide that interstate commerce would potentially or probably be affected if the defendant had successfully and fully completed his actions, then the element of affecting interstate commerce is satisfied. You do not have to find that interstate commerce was actually affected. However, if the defendant has finished his actions, and done all he intended to do, and you determine there has been no effect on interstate commerce, then you cannot find the defendant guilty.

You do not have to decide whether the effect on interstate commerce was harmful or beneficial to a particular business, or to commerce in general. The government satisfies its burden of proving an effect on interstate commerce if it proves beyond a reasonable doubt any effect, whether it was harmful or not.

The defendant need not have intended or anticipated an effect on interstate commerce. You may find the effect is a natural consequence of his actions. If you find that the defendant intended to take certain actions—that is, he did the acts charged in the indictment in order to obtain property—and

you find those actions have either caused, or would probably cause, an effect on interstate commerce, then you may find the requirements of this element have been satisfied.

The indictment alleges that the defendant aided and abetted the commission of the offenses in Counts Five through Seven. Under the aiding and abetting statute, it is not necessary for the government to show that a defendant himself physically committed the crime with which he is charged in order for the government to sustain its burden of proof. A person who aids or abets another to commit an offense is just as guilty of that offense as if he committed it himself.

Accordingly, you may find a defendant guilty of the offense charged if you find beyond a reasonable doubt that the government has proven that another person actually committed the offense with which the defendant is charged, and that the defendant aided or abetted that person in the commission of the offense. As you can see, the first requirement is that you find that another person has committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another if no crime was committed by the other person in the first place. But if you do find that a crime was committed, then you must consider whether the defendant aided or abetted the commission of that crime.

In order to aid or abet another to commit a crime, it is necessary that the defendant knowingly associate himself in some way with the crime, and that he participate in the crime by doing some act to help make the crime succeed.

To establish that a defendant knowingly associated himself with the crime, the government must establish that the defendant intended for money to be given in connection with the misuse of the defendant's official position. To establish that the defendant participated in the commission of the crime, the government must prove that defendant engaged in some affirmative conduct or overt act for the specific purpose of bringing about that crime. The mere presence of a defendant where a crime is being committed, even coupled with knowledge by the defendant that a crime is being committed, or merely associating with others who were committing a crime is not sufficient to establish aiding and abetting. One who has no knowledge that a crime is being committed or is about to be committed but inadvertently does something that aids in the commission of that crime is not an aider and abettor. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture. To determine whether a defendant aided or abetted the commission of the crime with which he is charged, ask yourself these questions: Did he participate in the crime charged as something he wished to bring about? Did he knowingly associate himself with the criminal venture? Did he seek by his actions to make the criminal venture succeed? If he did, then the defendant is an aider and abettor, and therefore guilty of the offense. If, on the other hand, your answer to any one of these questions is "no," then the defendant is not an aider and abettor, and you must find him not guilty.

The government introduced evidence that the alleged actions of the defendant violated Baltimore City Police Department general orders. Proof beyond a reasonable doubt that such actions occurred and that they violated such standing orders and even that the defendant knew his actions violated such standing orders does not, by itself, show that a defendant is guilty either of the participation in the charged conspiracy charged in Count One or any of the alleged extortions charged in Counts Five through Seven. A knowing violation of the general orders, however, if proved, is evidence you may consider in making your decision whether the government has proved each of the elements of the crime beyond a reasonable doubt.

In conclusion, let me remind you that your verdict must be unanimous, reflecting the judgment of each and every one of you. Consider it in the jury room deliberately and carefully, in light of the instructions which I have given you, and use the same common sense and the same intelligence that you would use in determining any important matter that you have to decide in the course of your own affairs.

It is your duty, as Jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow Jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender

your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow Jurors, or for the mere purpose of returning a verdict. If, after carefully considering all the evidence and the arguments of your fellow jurors, you entertain a conscientious view that differs from the others, you are not to yield your conviction simply because you are outnumbered.

Upon retiring to the jury room, your first duty will be to elect a foreperson. The foreperson has no extra vote, but he or she will preside over your deliberations and be your spokesperson in court.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the court security officer. Never attempt to communicate with the court except in writing. You will note from the oath about to be taken by the court security officer that they, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case. And bear in mind always that you are not to tell to the court, or anyone else, how you stand in terms of a numerical division, until after you have reached a unanimous verdict.

In order to record your verdict in this case, we have prepared a verdict form for you.

(Go over verdict form.)

When you have reached a unanimous agreement, the foreperson should fill out the verdict form in accordance with your agreement. Then the foreperson should sign and date the form in the space provided at the end.

When you have agreed and finished completing the verdict form, the foreperson should rap on the door and inform the Clerk or Court Security Officer simply that you have agreed upon a verdict. The foreperson should not disclose or indicate in any way what your verdict is at that time. The verdict must be announced for the first time in open court.

When you return to the jury box, the Clerk will ask you, "Have you agreed upon your verdict?" And we hope that you collectively will respond that you have.

The Clerk will then ask, "Who shall say for you?" All of you will respond, "Our foreperson."

Your foreperson will then stand and present the verdict form to the Clerk, who will show it to me. After my review, it will be returned to the Clerk for reading in open court.

[ALTERNATES EXCUSED]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. **CRIMINAL No.**

SAMUEL OCASIO **CCB-11-0122**

Defendant.

VERDICT OF THE JURY

We, the jury, render the following verdicts in the above-captioned case:

COUNT ONE (CONSPIRACY):

Do you find the defendant Samuel Ocasio guilty or not guilty of the conspiracy charge in Count One?

X	
Guilty	Not Guilty

COUNT FIVE (EXTORTION UNDER COLOR OF OFFICIAL RIGHT):

Do you find the defendant Samuel Ocasio guilty or not guilty of the extortion under color of official right charge in Count Five?

X	
Guilty	Not Guilty

COUNT SIX (EXTORTION UNDER COLOR OF OFFICIAL RIGHT):

Do you find the defendant Samuel Ocasio guilty or not guilty of the extortion under color of official right charge in Count Six?

X	
Guilty	Not Guilty

COUNT SEVEN (EXTORTION UNDER COLOR OF OFFICIAL RIGHT):

Do you find the defendant Samuel Ocasio guilty or riot guilty of the extortion under color of official right charge in Count Seven?

X	
Guilty	Not Guilty

Date: 2/23/12

[SIGNATURE REDACTED]
Foreperson of the Jury

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA

v. **CRIMINAL No. CCB-11-0122**

SAMUEL OCASIO

Defendant.

SENTENCING HEARING

Before: The Honorable Catherine C. Blake
United States District Judge

Baltimore, Maryland

June 1, 2012

* * *

[2–38]

THE CLERK: All rise. This Honorable Court now resumes in session, The Honorable Catherine C. Blake presiding.

THE COURT: Good afternoon, everyone. Be seated, please.

Ms. Kelly, if you would call the case.

MS. KELLY: Good afternoon. Calling the case United States versus Samuel Ocasio, CCB-11-0122. Tonya Kelly on behalf of the United States. Also seated at counsel table is Special Agent Rob Guynn and Detective Matthew Smith with the Baltimore Police Department, and we are here for sentencing.

THE COURT: All right. Thank you.

MR. CROWE: Good afternoon, Your Honor. Thomas Crowe on behalf of Mr. Ocasio, who is seated with me at counsel table.

THE COURT: Okay. Thank you. And we are here for sentencing. Mr. Ocasio was, of course, convicted after a jury trial on one count of conspiracy and three counts of extor[t]ion. I need to begin by calculating the advisory guideline range, and I understand there is at least one dispute. I think we're in agreement that the — and this would apply on all the counts together as I understand it — base offense level of 14, an increase of two because there was more than one payment, and then the presentence report calculated an additional two levels for the loss being greater than $5,000, essentially based on the Government's Statement of Facts, and I gather that is a matter of disagreement, so I'll come back to that.

Addressing the presentence report generally, other than that guidelines dispute and another dispute about restitution, any additions, corrections, modifications from the Government's point of view?

MS. KELLY: No, Your Honor.

THE COURT: Okay. Mr. Crowe?

MR. CROWE: No, Your Honor.

THE COURT: Obviously you've read it. Has Mr. Ocasio had a chance to read it?

MR. CROWE: Yes.

THE COURT: Okay. And nothing else. All right.

Okay. So we can talk about the amount of the loss. Depending on that, we are either at an offense

level of 16, Criminal History Category I, which I think is at 21- to 27-month range, or an 18, Criminal History Category I, which is from 27 to 33 months.

Why don't we go ahead and start with the amount of loss and how — I guess I'll turn to the Government, how you are calculating it at more than 5,000.

MS. KELLY: Yes, Your Honor.

The Government believes that, because Mr. Ocasio was convicted of 18 United States Code § 371, the conspiracy charge, that Mr. Ocasio is responsible in terms of a loss calculation under the guidelines for the losses attributable to himself personally, but also the losses of those other members of the conspiracy that were reasonably foreseeable to him.

The Government believes that it's taken a particularly restricted look at this and has come up with a pretty low number for Mr. Ocasio in light of the fact that he was part of a conspiracy that involved somewhere between 40 and 50 other Baltimore police officers. The Government believes that there was ample evidence at the trial to show that Mr. Ocasio was fully aware of Leonel Rodriguez' involvement in the scheme and should therefore be at least responsible for what Mr. Rodriguez' payments were.

I'd like to point to the few parts in the trial that I think the Court can look at here. Just it was a while ago for all of us. The first is that there was evidence at the trial that Mr. Ocasio, when he called Alex Moreno to pick up the car that Mr. Ocasio had encountered during the night that Mr. Moreno and

Rodriguez were going to call Mr. Rodriguez' car stolen, that there was contact between Mr. Ocasio and Rodriguez that night, which was not — Mr. Moreno's testimony was corroborated by toll records which show that, prior to picking up the car, Mr. Ocasio was in contact with Mr. Rodriguez, and I think Mr. Moreno testified that that was because he was coordinating logistically where they needed to go and what time they needed to get there. When Mr. Moreno arrived in the tow truck to pick up Mr. Ocasio's car, Rodriguez was also present.

Secondly, there was the wiretapped call that was played at the trial where Officer Rodriguez was telling Alex Moreno that Ocasio had told him that he was going to stop sending cars to him because of Mr. Moreno taking too long to fix his car.

And then, thirdly, Exhibit 81 at the trial were toll records, which establish communication between Mr. Ocasio and Mr. Rodriguez starting in November of '09 and spanning essentially up and beyond the arrest in this case.

Therefore, the Government believes and obviously the jury believed that Mr. Ocasio was in a conspiracy with others, including Mr. Rodriguez, and, therefore, the Government believes that any payments made to Mr. Rodriguez would be reasonably foreseeable to Mr. Ocasio.

Anticipating Mr. Ocasio's argument that he may not know that Officer Rodriguez happened to be much more frequent than he was, the Government believes a fair calculation at least would be that he could foresee that Rodriguez was at least as often as

he was, and the Government doesn't know any real other way to do it. I think the Government is being generous in that Officer Rodriguez happens to be, as the Court is aware, one of the most frequent officers who contacted Alex Moreno and ended up making a lot of money. There were checks to Officer Rodriguez in the 8 or $9,000 range, and more cash.

So the Government believes that a fair loss calculation and a generous to Mr. Ocasio calculation would be the $1,500 for referring cars that was proven at trial in combination with the loss to GEICO of approximately $2,500, and, if you then added a $1,500 amount for what was reasonably foreseeable to him to Mr. Rodriguez, that that would put him between 5 and $10,000. I recognize that that's not a perfect calculation, but I do believe that there is evidence that was presented during the trial and obviously accepted by the jury that supports that type of calculation in a situation like this where it's impossible to calculate with precision.

THE COURT: All right. Thank you.

Mr. Crowe?

MR. CROWE: Thank you, Your Honor.

The Government, of course, bears the burden of proof of establishing the specific offense characteristic that the amount of loss exceeded $5,000. We simply don't think that they've been able to do that on the presentation that they've given today.

Going straight to the calculations, if one accepts their assumptions that Mr. Ocasio received $1,500 —

and I think they actually proved — the jury actually found 900. I think there was evidence of two other payments, so that's probably fair. If this was a situation wherein my client also or my client should have expected that Mr. Rodriguez received at least that much, that would bring us to $3,000.

The difficulty with adding the other $2,515 is that my client's car was involved in a legitimate accident. Even if one believes that he was aware that Moreno was adding damage to the car — and we don't think that he was — the amount of loss to GEICO would have been considerably less than the 2,515 because the car was involved in a legitimate accident, and, again, it's the Government's burden of proof to show precisely what it is that we are talking about.

Going to the larger question, I would submit to the Court that the evidence that my client had any knowledge that Mr. Rodriguez was involved in these matters is pretty thin. My client did not call Mr. Rodriguez when an accident occurred. Mr. Rodriguez was involved with Mr. Moreno in a scheme where they were going to file a false report that Rodriguez' car had been stolen, and he was, as I say, pretty much along for the ride. I believe there was reference to the fact that there was a brief discussion of the two, but no evidence at all as to what was said.

With respect to Rodriguez' statement that my client had said that he had stopped sending cars to Moreno, that shows nothing with respect to what my client would have known about what Mr. Rodriguez was doing.

I think Ms. Kelly made a slip when she said that Mr. Rodriguez' testimony was corroborated by toll records. I think, as the Court is well aware, Mr. Rodriguez never testified in this case. He was a witness. He made a cooperation deal with the United States Government. He was on their witness list. He was not called to testify at trial, and, indeed, he is not present to testify in court this morning, although he would clearly be obligated to do so if the Government chose to call him.

I think, for all those reasons, we believe that the Government simply hasn't made the case for adding the additional two offense levels.

THE COURT: Do you want to comment on the restitution to GEICO issue?

MS. KELLY: Sure. And I think it's obvious that I misspoke. I wasn't trying to suggest that Mr. Rodriguez testified at the trial.

Yes. As to the restitution to GEICO, first of all, there was testimony at the trial as to this legitimate accident. The person who was also involved in the accident described what the bumper looked like after the accident as a small, little crack, and I also think that Mr. Moreno testified that it was just a crack in the bumper before they added the damage.

Secondly, I think that — and I apologize. I didn't know that this was the objection to the loss amount in terms of the specific, but I do think that there is an argument to be made that, when you commit insurance fraud like this, the loss amount is the entire claim paid by GEICO. If GEICO had known that Mr. Ocasio had lied to them and had added

damage, they may have refused the claim completely, and, to suggest that they would have said, "Okay. Well, we're going to fix that crack," and to try to, you know, deduct that from the $2,500, I don't think that would be how loss would be calculated if this were charged as an insurance fraud claim. If you lie to your insurance company, I'm not sure that they continue to cover you, or the accident, whatever it is that you were engaged in, besides the fact that there was evidence that the legitimate damage was a crack in the bumper.

THE COURT: I guess the problem I have, particularly given the context in which we are now making these decisions — and the burden is on the Government. It's following a trial. Perhaps you addressed that in your letter. That's an interesting theory that you've just addressed. It may very well be true. I don't believe there was anything in the record to support that, that GEICO would have taken a position to refuse the entire claim. I'm also not sure that there is evidence in the record to support Mr. Ocasio knowingly lying to GEICO. I seem to remember that the evidence was a little equivocal about when, if at all, he knew that Mr. Moreno was going to add damage.

MS. KELLY: Well, you know, frankly, Your Honor, I just disagree, that the testimony at trial from Shannon Seaders was that Mr. Ocasio had called his insurance company and specifically stated, "I saw the damage at the date of the accident. I walked to the date of the accident and saw it, and what there is, is exactly what it looked like that day."

THE COURT: Okay. So it's after the fact?

MS. KELLY: No. He — and then secondly —

THE COURT: The statement to Seaders? When is the statement to Ms. Seaders? That's what I mean.

MS. KELLY: Right. So Mr. Ocasio had told GEICO that, yes, when questioned about the damage — remember how it was like the height was much higher than a small Honda Civic? Mr. Ocasio had reiterated that, yes, in fact, that that is all the damage, I saw it on the date of the accident because I walked down to the scene of the accident.

The other person involved in the accident said that Mr. Ocasio was not there and not in the car, and, secondly, then, right after that line of testimony, there was also in that log that came in was that Mr. Ocasio had seen the damage with Mr. Adolf, who was the claims adjustor. There was that — it was an exhibit — I truly had no idea we were going to get this far into the weeds on the GEICO issue, and I apologize; I would have brought it with me — was that he had also reiterated with Mr. Adolf that, yep, that's all the damage that was on the car, and there is simply no way that all that damage was there, and he told GEICO that it was and that he saw it on the date of the accident.

THE COURT: Okay. Mr. Crowe?

MR. CROWE: Your Honor, my recollection is not as good as it should be with respect to the accident, and the statements which were, as I recall, on a very cryptic call log with a lot of abbreviations where somebody testified who was not, in fact, the person who made the entries.

My recollection is that there was a telephone conversation which was noted in which Mr. Ocasio was asked how it was possible that the damage had occurred, I think a bit higher than the bumper, and he simply and quite honestly said that he didn't know. I think the proof of the pudding on this matter is that, for whatever reason itself, GEICO being aware of the dispute, actually made the payment in the case, and, as I understand it, has not attempted to recover anything at this time.

I simply can't recall what the note was concerning, I think, Mr. Adolf, who was the insurance adjustor, in my mind. I'm just drawing a blank on that at this point.

THE COURT: And I don't know if it is in an exhibit that is as easily obtainable, but what Ms. Kelly is saying sounds familiar to me, and, again, I'm trying to determine when in the sequence of events Mr. Ocasio's responsibility may have come in. There is a slightly separate question about whether he knew in advance that damage might be added, but —

MR. CROWE: Yes.

THE COURT: — I do believe that Ms. Kelly's now recalled a sequence of events that I think is correct, that the damage was added, GEICO questioned it, Mr. Ocasio — the false statement is not, "I don't know how it happened," necessarily, but to claim that the damage was there, that he saw it the day of the accident, and it therefore must have come from the accident is what I understand and now recall to be the false part of the claim to GEICO.

MR. CROWE: Getting perhaps even further into the weeds, the question is, you know: Would there have been $600 worth of damage to the car without the damage added, and I don't know. Certainly this is matters that I think the Government could have proven with people at GEICO, if not at trial, certainly here at sentencing, and, again, it is their burden of proof.

THE COURT: Well, I think I will, for now, until we see where the rest of this goes, simply reserve on whether I'm going to add that two levels or not.

MS. KELLY: If I can, Your Honor, as we move forward, if the Court is inclined to not award restitution because of not knowing how GEICO would have dealt with the claim, the Government will ask for there to be a separate restitution hearing to be able to figure that out. I truly apologize. I wasn't entirely sure that this was the dispute. I think that it's permissible under the statute for there to be a separate restitution hearing, and, frankly, I think it only fair for GEICO. I take full ownership. I just don't think it would be fair for GEICO to not be heard on the issue, and I apologize to the Court for not recognizing sort of the specificity of this objection by Mr. Crowe, and take full responsibility for it, but the Government would ask that, if this is an issue for restitution, that we be able to do that.

THE COURT: Okay.

MR. CROWE: I thought our memorandum was pretty clear that we saw this as an issue. I don't know if the Court wants to hear argument on the other matters of restitution — that is, whether any restitution

should be offered to the Baltimore Police Department — and the question of forfeiture.

THE COURT: Yes, I do, depending on where we are. I'm looking at your memorandum. The presentence report noted a restitution request for the Baltimore City Police Department of $4,200, and I'm not sure whether that is repeated — I think it is — in the Government's correspondence, and my first question, I guess, is to the Government: Where does the 4,200 come from?

MS. KELLY: Your Honor, earlier, as we were proceeding with this case — this was prior to going through the sentencings of the various defendants, and so there was some conversation about, you know, whether, if he's being held responsible for Mr. Rodriguez' payments, whether that should be part of restitution, and the Government has abandoned that approach, and each defendant who has been sentenced prior to Mr. Ocasio has only been responsible for the payments to which he received, and not the conspiracy payments, and, therefore, the Government believes the restitution should be $1,500 to the Baltimore Police Department.

THE COURT: Which is a change from the position in your letter —

MS. KELLY: Yes.

THE COURT: — as recently as May 25th?

MS. KELLY: Yes.

THE COURT: Okay.

MR. CROWE: Your Honor, I realize that restitution and forfeiture aren't the predominant issues that

we're here on today, but we clearly take position in our brief that the Baltimore Police Department is not a victim in this case, but, if it is a victim, it is only entitled to restitution for the amount of its actual loss. We cited in a footnote the *Harvey* case, which is the Fourth Circuit law which governs in this district, and it says simply that an individual's gain is not tantamount to a victim's loss. The amount of gain maybe is a proper measure in forfeiture, but it is not the proper measure in a situation such as this.

The Baltimore Police Department clearly didn't lose $1,500. If the jury is correct and Mr. Ocasio did the things they say that he did, at most, what they lost was, you know, whatever time value that he took when he should have been working on his shift.

THE COURT: How do you respond to the Government's citation of the cases like *McNair*, which then quoted *United States versus Carter*? I mean, it seems to me that the theory is this was a betrayal of trust, he took advantage of his official position to get $1,500 that he wasn't entitled to, and that the Government, the public employer, should be entitled to recoup that?

MR. CROWE: With respect to the *McNair* case, as I recall it, that was a situation where a government contractor — I think probably a municipal contractor — had made illegal bribe payments. I believe it was for some land use and development determinations. The Court was quite explicit in saying that they felt that the contractor recouped those bribe payments from the Government authority simply by adding them back onto its contract bid with the Government, so the Court actually, I think, made an explicit

finding in that case that the amount of the gain was loss to the governmental entity itself.

The *Carter* case was actually a civil equitable action, not a criminal case, and it was actually a civil action for an accounting, as I recall, and, in that civil action, of course, where there is fraud involved — and my recollection is that the disgorgement of improper profits is a correct measure of damages in a civil action.

The only case that I found where they cited where a judge appears to have equated the amount of the illegal payments to the loss to a governmental entity was the case from the Eastern District of New York. It was *Abbadessa*, or something like that. It was certainly an opinion by a well-respected district judge, not that you're not all well respected, but it was Judge Jack Weinstein, and what he simply did was that — it's a very long opinion, and, as he went — this was a case where people, who were taxi commissioners, were being paid, as I recall, to ignore problems with taxes, to pass them through the inspections, and, in that case, Judge Weinstein did, for each of the individual defendants — I think there was some 15 or 20. For each one of them, he simply added in the amount that they had received as being owed in restitution to the City of New York. He didn't explain why he did it. It wasn't subject to appeal, and, again, we think the *Harvey* case is the governing authority in this jurisdiction.

THE COURT: Ms. Kelly?

MS. KELLY: Your Honor, I think the theory that is advanced in these line of cases is that which the

Government believes is the accurate one, that this is a betrayal of trust, and that there is a loss to the police department when Mr. Ocasio, instead of patrolling and working and doing the things he's supposed to do as a police officer, is instead waiting at accident scenes for tow trucks to arrive longer than he should, or making calls to Officer Rodriguez to tell him how to get Alex to get there, and that there is a loss to the City for Mr. Ocasio's services that he should be providing to the City while he is instead engaged in what he was doing.

For instance, the night of Victor Reillo's car, I mean, hours of his shift were spent coordinating Mr. Moreno getting to the Southeast District to pick up Victor Reillo's car instead of doing whatever else Mr. Ocasio is supposed to be doing when he's working. I think there was testimony that, the night that Mr. Ocasio went to the scene for Quintanilla's car, that the other officer who testified, Horace — I can't remember his last — McGriff. Officer McGriff testified that he was pretty much ready to go, and Mr. Ocasio is hanging around.

I think that there is just absolutely a loss to the Baltimore Police Department when Mr. Ocasio is calling Alex Moreno instead of doing his job, and I don't think that $1,500 to the Baltimore Police Department is an outrageous amount or some unreasonable amount for Mr. Ocasio to repay.

In response to Mr. Crowe's sentencing memorandum, he had advanced the argument that Mr. Ocasio should not have to repay the $300 that Alex Moreno paid him for bringing his own car, and the $300 that he had paid for bringing Victor Reillo's

car, and, again, I think the Government's taken a real restrictive view of this. I think there is an argument to be made that Alex Moreno is making those payments to him so that Mr. Ocasio will keep sending him cars, and that $600, while it might not be in exchange for his official duty, it's almost like lulling. It's almost like encouragement to stay part of my scheme. I think that $600 could absolutely be included in both the loss amount and the restitution amount.

I think the Government has taken a fair, restrictive view of the five incidents that were proven or evidence was put on at trial, three of which were substantive counts of the Indictment, and I think it would be fair to say that the Baltimore Police Department, in dealing with what Mr. Ocasio did, has lost $1,500. How about the pay of Detective Matthew Smith who sat at this trial for two weeks and in investigating this case? I mean, the entire IAD has been part of this, you know, massive investigation, the massive conspiracy in which Mr. Ocasio was a part of, and to suggest the Baltimore Police Department didn't lose some value is unfair, and, when it's fairly impossible to come up with an exact value, the amount of the gain is an acceptable way to value it, and the Government believes that that's a fair way to look at it.

THE COURT: Mr. Crowe?

MR. CROWE: Ms. Kelly has made a number of points, and I hope my recollection both as to what she said and what happened at the trial is correct. My recollection is that, with respect to Mr. Quintanilla, he was the gentleman whose car was damaged and

was in the backyard of his residence, that my client was called because they needed a Spanish-speaking interpreter. In fact, Mr. Quintanilla had an interpreter when he testified in court.

With respect to the $300 on Mr. Ocasio's car, that is not a matter that the Government has said that they thought should be taken into account until Ms. Kelly did so just a minute ago. We certainly did say that the payment for Reillo was not something which should be considered restitution, because it was not money that he gave for referring Mr. Reillo under color of official right. It was a referral as a friend, and I think it would be sort of silly to say that Reillo did it for that reason, and Mr. Reillo, of course, was a Government witness.

With respect to the statement that, you know, Detective Matthew Smith has been here in court and has caused the Baltimore Police Department quite a bit of money, I don't doubt that an awful lot of money has gone into the investigation in this case, but I think the evidence — I mean, I think that the loss, quite clearly that's not a proper measure of restitution, that restitution is just simply the loss, not what you had to do to investigate the claim or to prosecute it. Otherwise, you know, restitution would be the tail that wagged the dog in a lot of criminal cases.

THE COURT: Okay. Well, on the restitution question, which is a little bit distinct from the amount of loss question under the guidelines as I read the various cases that were cited both by the Government and Mr. Crowe, I find sufficient support to award to the Baltimore Police Department the

amount of $1,500 that results from the five admitted payments of $300 each to Mr. Ocasio for referring civilians — not a friend, not himself — to Majestic in contravention of his duties to the Baltimore Police Department.

I think that this order of restitution would properly be entered under 18 U.S.C. § 3663, the Victim-Witness Protection Act, I believe it's called, as a matter of the Court's discretion, rather than the mandatory act. I do believe that the actions that Mr. Ocasio took were a betrayal of trust and not what he should have been doing to fulfill his duties to the Baltimore City Police Department. If one were to even attempt to calculate it, I would certainly agree with the Government that there is at least that amount of value of time that Mr. Ocasio should have been spending on his correct and legitimate duties owed to the City rather than on participating in this scheme for his personal gain.

So I think, either looked at in a purely monetary loss to the City from the time monetary value to his services, or on the principle that he should be required to disgorge what he got by wrongfully using his public position to that public employer, as I say, under either or both — a combination of theories, I think an order of restitution to the Baltimore Police Department for the sum of $1,500 is correct.

Forfeiture, I'm not sure that I see the basis for or that we need to try to press in this case.

MS. KELLY: Usually there would be a money judgment — a forfeiture order for a money judgment

for the $1,500, but, in such a low amount, I don't think it's necessary in this case.

MR. CROWE: If there is no issue, there is no issue.

MS. KELLY: Yeah.

MR. CROWE: That's fine.

THE COURT: Okay. I believe, for an award under the Victim-Witness Protection Act, 18 U.S.C. § 3663, I'm also required to make some findings about Mr. Ocasio's ability to repay that. I don't know if that's really a dispute. I think he clearly has the ability at some point down the road to earn enough money to gradually, on a reasonable payment schedule, pay back that $1,500, but —

MR. CROWE: We agree, Your Honor, and will not contest that.

THE COURT: Still leaving somewhat unresolved the amount of loss for guidelines purposes and the issue of restitution to GEICO, which I believe would be under 18 U.S.C. § 3663(a), the mandatory restitution section, why don't we move on to recommendations for sentence, taking into account the 3553(a) factors, relative culpability, and any other matters you'd like to address, Ms. Kelly?

MS. KELLY: Without knowing the ultimate advisory guidelines range, consistent — you know, the Government's position in terms of Mr. Ocasio is no different than the other officers, and essentially basically what the Government's recommendation has been is sort of the low end of the advisory guidelines range, not knowing what that is, but

consistent with the other recommendations in the sentencings.

Mr. Ocasio is simply not one of the most culpable members of the conspiracy. The Government concedes that and believes that in no way has it attempted to dress Mr. Ocasio up as that. You know, besides the issue with his own car, the Government did not put on evidence at the trial that he was engaged in adding damage to other cars and being part of the insurance fraud claim. I think Mr. Moreno admitted that Mr. Ocasio was not one of the officers that he would go to for false — just, you know, straight false reports.

All that being said, the Government still believes that being part of the scheme and referring cars to Alex Moreno and Majestic for cash payments is still extremely serious, and that it's been said many, many times, but betrayed the trust of the citizens of Baltimore and the Baltimore Police Department, and, without a doubt, Mr. Ocasio's membership in this conspiracy and being part of the scheme has detrimentally and negatively affected the Baltimore Police Department, the citizens of Baltimore, and being part of this conspiracy has really widespread repercussions.

I mean, this case, even though Mr. Ocasio played a small part and maybe played a less culpable part compared to everybody else, I mean, it's in the paper almost every other day. I mean, it's just something that I think the City and the citizens of Baltimore are going to feel for a very long time, and, for that reason, the Government believes that a sentence of

incarceration is appropriate, regardless of where Mr. Ocasio fits in the overall part of it.

THE COURT: Okay. Thank you, Ms. Kelly. Mr. Crowe?

MR. CROWE: Thank you, Your Honor. This is, of course, a difficult day for Mr. Ocasio. My formal request is that he either be placed on probation, or, failing that, give him supervised release with the condition of home detention; however, being realistic, I know that the Court has sentenced a number of officers — I think probably about ten in total — and the sentences have ranged from 8 to 42 months. Therefore, we would suggest that, if the Court does determine to sentence him to a period of imprisonment, that he should be towards the low end of those officers who have already been sentenced, and we would be talking clearly about something in the range of eight months, but no more than — I guess no more than a year and a day.

We're also going to be asking — and I sometimes forget to do these — that the Court recommend to the Bureau of Prisons that he be placed in a facility which is as close as possible to his home in Harford County, but that that be consistent with a facility which can provide security for former law enforcement officers. They sometimes have a great deal of difficulty when they go into federal prisons. We would also ask that he be allowed to self report, and I understand from a conversation with Ms. Kelly a couple of days ago that the Government does not object to that.

Our principal argument, of course, is going to be on variances. The Court probably knows more about Mr. Ocasio than it does about many of the defendants that it has sentenced in these series of police towing cases. He was here, of course, during a six-day trial. The Court has heard the testimony of Juavier Conde, who is a current Baltimore City police officer; Ramon Guzman, who is retired from disability, and the testimony of Pastor William Soto.

I received an e-mail letter from Pastor Soto late last night, which I provided and I expect the Court has gone over and read. It confirms a great deal of what has been said; that is, that my client is a force for good within the Hispanic community up in Harford County, and that is particularly true with respect to his church about which the Court has heard testimony and which Pastor Soto has described.

I would also note that present in the courtroom here today is J.B., who is one of the teenagers that Mr. Ocasio supervises, and that Mr. J.B.'s mother and stepfather are here also. There are people who care about Mr. Ocasio. I'm sure the Court knows that from the attendance that we had during the trial and from the fact that these people are here today.

Mr. Ocasio has a 20-year stable marriage. He has two children who are doing well, and they have obviously suffered because of this conviction. His presentence report indicates he has not been able to find a job. There has been a great deal of financial hardship since he was discharged from the Baltimore City Police Department and charges were pressed against him in this case.

We introduced during the trial and appended again to our sentencing memorandum three commendations that he had received regarding two incidents. My recollection is that they both involved recovery of weapons, and that one of the incidents actually involved a foot chase where he had to go after an individual and disarm the individual. We think that these commendations are things which are clearly part of the entire picture.

We realize that, in considering a variance, the Court also has to take into account the seriousness of the offense and the deterrent effect. I don't think there is any question that this is a serious offense, and, from the sentences which the Court has imposed, clearly the Court views them as such, but I would point out that a lot of the seriousness of the offense is already taken into account in the guidelines.

In terms of deterrent effects, it would seem to me that this entire series of prosecutions has had a considerable deterrent effect, and I can't imagine that what this Court does with Mr. Ocasio, six months one way or the other, is going to add very much to the quantum of deterrent effect that we have in this case.

Also — I think it's under 3663(a)(6) — I might have missed a couple of other subsections there — in issue is the avoidance of unwarranted sentencing disparities of those convicted of similar conduct. I understand that everybody else the Court has sentenced has pled guilty and they got credit for acceptance of responsibility. I don't know this, but I would expect that a great many of them may have

gotten credit for substantial assistance, even though, to my knowledge, I don't think anybody testified — well, I'm quite certain that nobody testified in court.

As Ms. Kelly has said, my client did not tell people involved in accidents that they should not contact their insurance carriers before they talk to Majestic. He did not write up phony reports exaggerating the amount of damage. He did not, as I think one or two officers did, inflict additional damages to the cars themselves at the accident scenes so that the damage would match the phony reports that they were writing. He did not — I think Mr. Cintron did; I may be wrong — actually go out and scour the parking lots for cars that had already been damaged and convince people to say that — convince people — you know, go out, use a computer, hunt out the owners, and get them to say that the accident had just occurred so he could write up a report, and I think there was even one officer who just went around and banged up cars in a parking lot for that reason.

My client didn't do that. He didn't backdate — I'm sorry. He didn't update accident reports to make it appear that — I'm sorry. He didn't postdate accident reports to make it appear that an accident occurred six months ago, when an individual had coverage, rather than that night, after the coverage had lapsed. He didn't recruit owners to make claims, and he's clearly not somebody who operated in conjunction with a lot of other officers.

Mr. Ocasio is a very nice man. If I can be permitted to say it, he has been a most easy client to work with, cooperative, always on time, always

responsive, and just a genuinely nice guy. So, for his sake and the sake of his family, I would ask that the Court be as lenient as it conceivably can in terms of imposing a term of imprisonment.

THE COURT: Thank you, Mr. Crowe. I appreciate it.

I'll certainly come back to Mr. Ocasio in just a minute. Getting back to the question of restitution to GEICO, what appears to me would be reasonable is essentially leaving — if we are not in agreement on that point right now, if we can agree on a short period of time to supplement the record if there is something that needs to be done by way of supplementation, or simply to look at some exhibits. I am concerned whether or not Ms. Kelly should have better anticipated the details of Mr. Crowe's argument. Whether she should have or not, she didn't, but what she has said today, reminding us about the false statement that it would appear Mr. Ocasio made, which I would think could be readily determined by an examination of trial exhibits, I would be troubled not to be in a better position to consider the amount of restitution that might be due to GEICO, so I'm suggesting, depending on how long this might take, there are a couple of ways of doing it. We can, of course, continue the proceeding and have everybody back here in court, or we could agree to leave this issue open for just a relatively short period of time, and perhaps counsel and I could have a conference call about it, or just to say come back into court if we have to. What would you propose, Ms. Kelly?

What do you think is already in the record?

MS. KELLY: I believe what is in the record are the logs of Mr. Ocasio's contacts with Shannon Seaders and Mr. Adolf in terms of — there is really two issues, right? One is whether Mr. Ocasio made a false statement so that there would be any loss to GEICO. The Government feels confident it can find the trial exhibit or bring it quickly, and the Government feels confident that those logs establish that Mr. Ocasio absolutely represented to GEICO that the damage on the vehicle was there at the time of the accident, and it wasn't, and so the Government feels very confident that, with one trial exhibit, that that would be —

THE COURT: Don't we have the trial exhibits here?

MS. KELLY: You know, it was a late addition, and so I don't think it's in those. I would double check, but I think this was kind of a moving part, and my recollection was that we — we may have updated your binders. I could find it very quickly, but the other issue would be the amount, and I truly believe that the Government's position remains, and I'm sure GEICO's is that, if it's a fraudulent claim, the whole thing is fraudulent.

THE COURT: Right.

MS. KELLY: You know, there is no way for GEICO to now go figure out what the crack really looked like and figure out how much that would have cost to fix, because we don't know what it really looked like, because Mr. Ocasio provided a false statement about it. Nobody saw it besides Mr. Ocasio and Mr. Moreno prior to the adding of the damage. So, to suggest that we can parse out the amount that GEICO would have paid to fix it, it's just not reasonable. If it's a

fraudulent claim, the entire thing is fraudulent, is the Government's position, which is the reason that I didn't think I needed GEICO to say, "I would have paid $500 if I had known about the crack," I mean, because the Government's position is, if it's a fraudulent claim, the entire thing is fraudulent. That's sort of, I think, a reasonable approach.

So I think we're then back to just Part 1, which is: Did Mr. Ocasio, in fact, make a false statement? And, again, the Government's position is that there was ample evidence at the trial to make that finding. There is one exhibit in particular that I think spells that out. It's a log, and I can check the binders, or I'm happy to run across the street and grab it as well.

THE COURT: Okay. Anything else you can think of, Mr. Crowe?

MR. CROWE: No, Your Honor. I certainly want to look into the legal basis for saying that, if part of the claim was false, then the entire claim was false. I certainly know in Government contracting, that somebody puts in a claim for three months' work, and four or five days is something which is questionable, typically the whole claim isn't disallowed; it's just the four or five days, but I'm really pretty much at sea as to what the law is with respect to the theory the Government suggests.

MS. KELLY: I mean, I'm simply suggesting how in the world would we know? We don't know what the damage was really. There is no way for GEICO to make an evaluation as to the amount it would have paid if Mr. Ocasio didn't commit the fraud.

THE COURT: Right. I agree. The trouble is that this wasn't briefed, and it wasn't recognized, and we're in a difficult position because I would prefer to have some opportunity to, if we're not going to reach agreement, look into this before creating a record which is obviously going to the Fourth Circuit, and we'll want to understand what the basis for the restitution amount was.

So I believe that I am entitled to defer on the amount of restitution for up to 90 days in order to have further proceedings, and, if that's where we are, that's what we'll have to do. So we resolved the other issues.

Mr. Ocasio, if there is anything you'd like to say before I make a final decision about the sentence in this case other than this one issue of restitution, you have the right to do that. I won't hold it against you if you don't, but, if you'd like to speak, you have the right to do that.

MR. CROWE: Your Honor, I have advised Mr. Ocasio that, because of the likelihood of an appeal, it would probably be inadvisable for him to make any statement at this time, and I expect he'll confirm that that's the advice and that's the reason for his decision.

THE DEFENDANT: It is, Your Honor. I totally accept the advice.

THE COURT: All right. That's perfectly understandable.

Okay. Going back to the issue of the additional two levels for loss, I'll have a couple of comments to

make on that. First of all, I'm not going to impose the additional two levels for the loss being greater than $5,000. It is something that the burden is on the Government to prove. I note that, even with the 1,500, plus the 1,500, plus the full 2,500, we would be only over the $5,000 by $500. I think there is enough question about fairly attributing amounts of money that were paid to Mr. Rodriguez to Mr. Ocasio in the absence of any direct testimony from Mr. Rodriguez to raise a question there.

There is still a little bit of a question in my mind about the GEICO claim, although, frankly, I think, for purposes of calculating the amount of loss under the guidelines, the Government's theory would probably prevail. It's a fraudulent claim. It becomes a fraudulent claim, but there is still an issue about Mr. Rodriguez, and it is not an issue that I think we need to build into this, because there are 3553(a) factors that are going to control the sentence, so my sentence would not change. If I'm wrong on that, if it should have been 18, my ultimate sentence would not change, but I think that the advisory guideline calculation should be offense level of 16, criminal history category of I, and that is a range from 21 to 27 months.

Now, before I proceed, has anybody not had a chance to say anything they want to say, anything that's out of here?

(No response.)

THE COURT: Okay. The substance of what Mr. Ocasio did obviously is a major thing for me to take into consideration here along with the relative

culpability. The same factors that have played into my decisions in the other officers' cases are at work here. First of all, it is obviously a serious offense for all the reasons that have been stated. The importance of the public being able to put confidence in the trustworthiness of their sworn officers, the fact that someone who has taken an oath to uphold the law does not knowingly violate it to the detriment of the people he is supposed to be serving, I think we all understand that.

Mr. Ocasio's involvement in this, as — and the Government has not tried to exaggerate it at all. I don't believe Mr. Ocasio's involvement is at a lower level than a number of the other officers I have sentenced. In terms of the number of referrals, it's not that many. Other than the one false statement about a personal car, I don't believe there was evidence about creating false reports, knowingly adding damage to other cars, having the widespread involvement that a number of other people did, and of course that's reflected in the advisory guideline range.

Mr. Ocasio has done commendable things as well for the City of Baltimore, has earned commendations, has, in many aspects of his life, done good things and tried to do good things.

In comparing the offense, his culpability, however, and where he should be in terms of the sentence — and I do believe a sentence of incarceration is required — I must also take into account that Mr. Ocasio, unlike Mr. Reeping, for example, and some of the other officers that have been sentenced to lower amounts, Mr. Ocasio did not

come forward and accept responsibility, and he did not cooperate with the Government. He did not earn a 5K1 motion.

That is entirely his right. It is not something to be punished for, but I cannot also give him the benefit that I did give some other officers for either acceptance and/or cooperation, without going into names, but he simply did not earn that, and, therefore, I believe that an appropriate period of incarceration in this case, Mr. Ocasio, is 18 months in the custody of the Bureau of Prisons, and that is going to be a concurrent sentence on Counts 1, 5, 6, and 7 — 18 months in the custody of the Bureau of Prisons.

There is going to be a period of three years of supervised release following that period of incarceration, which will assist in the paying back of the restitution. As I have already indicated, the amount of $1,500 to the Baltimore City Police Department under 18 U.S.C. § 3663, the Victim-Witness Protection Act, I think is justified as a matter of discretion, and is something you would have the ability to pay back. I will impose a nominal payment schedule of $100 a month recognizing you're currently unemployed, but you can begin to pay it back through the Inmate Financial Responsibility Program, and then, as I say, a nominal payment schedule after that, which the probation officer will have the authority to recommend a change in if warranted by financial circumstances.

Regarding the issue of restitution to GEICO, as I've just indicated, I will reserve on that. I will consult with counsel about what needs to be done by

way of either briefing or gathering together exhibits to be able to make an informed determination, and I will consult with counsel at that point about whether Mr. Crowe and his client wish to come back into court for that final part of the proceeding or not, but I'm just deferring on that at this point.

Now, Mr. Ocasio's financial circumstances, I don't believe, permit imposition of a fine in addition to whatever the final amount of restitution will be. There is a required $100 special assessment on each count, so that's a total of $400 by way of special assessment.

I'm going to suspend drug testing. That does not seem to be an issue for Mr. Ocasio. I certainly will permit self reporting, will recommend a facility as close to his home as possible that is consistent both with his security level and his security needs. Special conditions of supervised release will — because of the restitution being in there and the need to assess financial circumstances, special conditions of supervised release would include providing the Probation Office access to any financial information that it might want to see, and not opening new lines of credit without permission.

In terms of a self reporting date, ordinarily the designations are taking six to eight weeks, something like that. I would probably, at this point, look at July 30th?

THE CLERK: Right.

THE COURT: July 30th, sir, would be a backup date. In other words, you'll get a judgment that says that you have to report to the institution where you are

designated. You'll get a designation in writing to tell you where. If you don't get that designation, the judgment is going to say that you have to report to the Marshal on July 30th. In fact, if it gets anywhere close to July 30th and you have not gotten a designation, get a hold of Mr. Crowe and, if it's through no fault of your own, we'll be able to extend that designation date.

Have I left anything out of that? Any legal objection? Anything I have not covered in that sentence?

MS. KELLY: No, Your Honor.

MR. CROWE: No, Your Honor.

THE COURT: Okay. All right. Mr. Ocasio, other than the one matter of restitution, that is the sentence. You have the right to appeal. You'll talk to Mr. Crowe. Any appeal would need to be noted within 14 days.

You understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Okay.

MS. KELLY: The Government would move to dismiss the original Indictment against Mr. Ocasio. He was convicted under the Superseding Indictment, so —

THE COURT: Sure.

MS. KELLY: — the Government moves the original Indictment.

THE COURT: All right. If counsel would call the office early next week to set up a conference call.

MS. KELLY: Okay.

MR. CROWE: Yes, Your Honor.

THE COURT: All right. Thank you.

THE CLERK: All rise. This Honorable Court now stands adjourned.

(Proceedings adjourned.)

* * * *

No. 14-361

In the
Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

The Hobbs Act defines extortion, in relevant part, as "the obtaining of property from another, with his consent, under color of official right." 18 U.S.C. § 1951(b)(2).

The question presented is:

Does a conspiracy to commit extortion require that the conspirators agree to obtain property from someone outside the conspiracy?

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INTRODUCTION

This case requires the Court to determine the proper scope of federal prosecutors' authority under the Hobbs Act, 18 U.S.C. § 1951. The Act forbids both extortion and conspiracy to commit extortion and defines extortion, in relevant part, as the obtaining of property "from another, with his consent, under color of official right." *Id.* § 1951(b)(2). The government interprets that provision very broadly. In its view, when a public official commits extortion by wrongly using his authority to obtain property from a private citizen with the citizen's consent, the public official is also guilty of the further crime of "conspiring" with the citizen to extort that citizen's own property. Petitioner challenges the government's expansive interpretation and argues that, under the statute's plain text, a Hobbs Act conspiracy requires that the conspirators agree among themselves to wrongly obtain property from someone *outside* the ring of conspiracy.

Petitioner Samuel Ocasio is a former Baltimore police officer who was accused of agreeing with owners of a local repair shop to refer damaged cars to the shop in exchange for cash payments. Under this Court's precedent, petitioner's conduct constitutes extortion "under color of official right." *See Evans v. United States*, 504 U.S. 255, 268 (1992). That is because, under the government's allegations, petitioner obtained property from the repair shop owners with their consent when he purportedly accepted payments knowing that they were made in exchange for official acts. *See id.* Not content with

prosecuting petitioner for extortion, however, the government sought to press for additional advantages by bringing a separate count for conspiracy to commit extortion under color of official right. *See* 18 U.S.C. § 371. The government's theory—accepted by the courts below—was that petitioner conspired *with* the owners of the repair shop to extort money *from* the owners of the repair shop. In other words, the repair shop owners were both petitioner's co-conspirators and the victims of their own conspiracy. Petitioner was therefore convicted of conspiring with the repair shop owners to obtain property "from another" even though no "another" was involved.

The government's theory is at war with the statutory text and basic principles of interpretation. When a public official and a private citizen enter a wrongful agreement to exchange property between themselves, no fluent speaker of English would say that they have collectively agreed to obtain property "from another," as the statute requires. The government's interpretation turns the Hobbs Act into a sweeping federal tool for policing the *paying* of bribes, on the view that to bribe an official is to conspire with that official to victimize oneself. It transforms every act of *receiving* a bribe into a conspiracy to commit extortion, eliminating the distinction between a conspiracy and the underlying substantive offense. And it disregards the carefully crafted network of state and federal statutes that have long governed this area of law.

The court of appeals should have rejected the government's attempts to expand its authority far

beyond what that text can reasonably bear. Instead, the Fourth Circuit disregarded the rule of lenity and accepted the government's adventurous reading. Then, seeking to avoid the least desirable consequences of its overly broad interpretation, the Fourth Circuit applied an invented exception to the Hobbs Act that limits punishment only to those who "actively participate" in an act of extortion. That made-up standard is unworkable and vague. Every payment of a bribe is, after all, an act of "active participation" in a bribery scheme. Accordingly, if the exception is to mean anything, something more than a mere payment of a bribe is needed to constitute "active participation." But what that something might be, the Fourth Circuit did not and could not explain, precisely because "active participation" is nowhere to be found in the statute. This Court should reverse the Fourth Circuit's decision allowing this expansion of federal prosecutorial authority under the Hobbs Act.

OPINIONS BELOW

The opinion of the court of appeals is reported at 750 F.3d 399, and reproduced at Pet. App. 1–29. The relevant orders of the district court are unreported and reproduced at Pet. App. 30–44.

JURISDICTION

The court of appeals issued its decision on April 29, 2014. Pet. App. 1. A timely petition for rehearing en banc was denied on May 28, 2014. Pet. App. 45. The petition for certiorari was timely filed and granted on March 2, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Hobbs Act, 18 U.S.C. § 1951, provides in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

The government charged petitioner, a former police officer, with conspiracy under the Hobbs Act, accusing him of agreeing *with* two private citizens to extort property *from* those citizens. The Fourth Circuit upheld petitioner's conviction, accepting the government's theory and ruling that the Act requires no proof of an agreement to obtain property from someone outside the conspiracy, so long as the person whose property is obtained "actively participated" in the conspiracy.

A. Statutory Background

Congress enacted the Hobbs Act in 1946 to address acts of robbery and extortion committed by organized labor. *See* Act of July 3, 1946, ch. 537, § 1(c), 60 Stat. 420; *United States v. Culbert*, 435 U.S. 371, 376–77 (1978). The Act imposes criminal liability on "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. § 1951(a). It defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2). Violations are punishable by up to twenty years' imprisonment. *Id.* § 1951(a).

As this Court has observed, the Hobbs Act targets two types of extortion. The first—extortion "under color of official right"—tracks the common-law offense that occurs when *public officials* take money

(or other property) not due to them under the pretense that they are entitled to it by virtue of their office. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 402 (2003) (citing 4 W. Blackstone, Commentaries on the Laws of England 141 (1765), and 3 R. Anderson, Wharton's Criminal Law and Procedure § 1393, at 790–91 (1957)). The second addresses the problem of private racketeering and organized crime. To that end, the statute "expand[s] the common-law definition of extortion to include acts by *private individuals*," but only when property is obtained through the wrongful use of actual or threatened force, violence, or fear. *Evans*, 504 U.S. at 261 (emphasis added); *see also Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2013) ("The crime [of extortion] originally applied only to extortionate action by public officials, but was later extended by statute to private extortion.").

This case involves alleged extortion by a public official "under color of official right." As courts and commentators have noted, federal prosecutors have used this provision as a weapon of choice for prosecuting an ever-wider range of conduct by public officials. *See* John S. Gawey, *The Hobbs Leviathan: The Dangerous Breadth of the Hobbs Act and Other Corruption Statutes*, 87 Notre Dame L. Rev. 383 (2011). Most significantly, in a 1972 decision, the Third Circuit defined extortion broadly to reach what was effectively local bribery affecting interstate commerce. *United States v. Kenny*, 462 F.2d 1205, 1210–12 (3d Cir. 1972). Since that decision, federal prosecutors have treated the Hobbs Act as "'a special code of integrity for public officials.'" *United States v. O'Grady*, 742 F.2d 682, 694 (2d Cir. 1984) (en banc)

(quoting Letter from Raymond J. Dearie, U.S. Attorney for the Eastern District of New York, to the U.S. Court of Appeals for the Second Circuit (Jan. 21, 1983)).

In 1992, in a fractured decision, this Court endorsed an expansive reading of extortion "under color of official right," holding that extortion by a public official is the "rough equivalent of what we would now describe as 'taking a bribe.'" *Evans*, 504 U.S. at 260; *see also id.* at 276 (Kennedy, J., concurring in part and in the judgment); *id.* at 283 (Thomas, J., dissenting). The Court thus concluded that a public official commits extortion under color of official right when he "obtain[s] a payment to which he was not entitled, knowing that the payment was made in return for official acts"—for example, when he accepts a bribe. *Id.* at 268.

In *Evans*'s wake, the Court has consistently resisted calls to further extend the Hobbs Act's reach. The Court has concluded, for example, that merely interfering with someone's property rights does not qualify as "obtaining of property from another." *Scheidler*, 537 U.S. at 409. Threatening or committing physical violence unrelated to extortion falls outside the Hobbs Act's scope. *See Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 16 (2006). And compelling a person to recommend that his employer approve an investment does not constitute "the obtaining of property from another." *Sekhar*, 133 S. Ct. at 2723.

B. Factual Background

Petitioner, Samuel Ocasio, is a former police officer who began his law-enforcement career with nine years of honorable service for the San Juan Police Department in Puerto Rico. JA 76. In 2007, he was hired by the Baltimore Police Department. *See* JA 74–76; JA 181–82. During his time as a Baltimore police officer, petitioner received numerous accolades and letters of commendation; other officers described him as honest and law-abiding. *See, e.g.*, JA 77–82, 185–90.

In 2011, the government charged petitioner with allegedly receiving payments from the owners of an auto repair shop for referring individuals involved in car accidents. Two brothers, Hernan Alexis Moreno Mejia (who went by the surname Moreno) and Edwin Javier Mejia (who went by Mejia), owned and operated the Majestic Auto Repair Shop in Rosedale, Maryland, near Baltimore. Pet. App. 2. Over the course of several years, Moreno and Mejia paid police officers to encourage car-accident victims to send their vehicles to the shop for repair. Pet. App. 5–6. As Moreno explained at trial, police officers are "the first people to go to [accident] scenes" and could effectively route business to Moreno and Mejia that might otherwise have gone elsewhere. JA 97. Referral fees started out at $150 apiece, but eventually reached $300. Pet. App. 6. By 2011, some sixty officers were making referrals to the brothers, accounting for the vast majority of Majestic's business. JA 96–97, 99–100.

In March 2011, the Federal Bureau of Investigation arrested Moreno, Mejia, and seventeen

police officers, including petitioner. JA 28–29. The initial indictment charged a wide-ranging conspiracy in which Moreno and Mejia were the key players linking numerous police officers together. Moreno and Mejia subsequently accepted plea agreements in exchange for cooperating with the government, as did most of the officers, pleading guilty to the government's conspiracy charges. Pet. App. 3.

C. Trial and Conviction

Petitioner, along with another officer, Kelvin Manrich, pleaded not guilty and the two men were tried jointly. None of the specific acts of extortion alleged against petitioner, however, in any way involved Manrich (or vice versa). The two men patrolled different areas of the city and there is no indication that, until their arrests, they had ever even heard of each other. The only justification for the joint trial was that both men were charged with involvement in the same conspiracy.

The superseding indictment charged petitioner with three counts of substantive extortion based on three separate incidents in which he allegedly accepted payments in exchange for referring business to Majestic. JA 41–42; *see also* Pet. App. 3–5. In addition, the government included a separate charge for conspiracy to commit extortion. JA 33, 42 (pleading charge under general conspiracy statute, 18 U.S.C. § 371). The conspiracy charge alleged that petitioner conspired "with Moreno and Mejia to obstruct, delay, and affect commerce and the movement of any article and commodity in commerce by extortion, that is, to unlawfully obtain under color of official right, money and other property from

Moreno, Mejia, and [the Majestic Repair Shop], with their consent in violation of [the Hobbs Act]." JA 36. The elements of the conspiracy charge were materially identical to the substantive extortion charge, with the government accusing petitioner of conspiring *with* the people who paid him to obtain property *from* the people who paid him.

Consistent with the indictment, the government's theory at trial was that Moreno and Mejia were petitioner's co-conspirators. In its closing argument, for example, the government described the conspiracy as including Moreno and Mejia. The prosecutor told the jury: "You heard from Alex Moreno. You heard from his brother. You heard telephone calls, repeated calls from multiple people discussing the sending of cars in exchange for money. That's all evidence of an agreement.' JA 196.

The government fought hard to charge this case as a conspiracy for a reason: The conspiracy charge enabled the government to introduce a great deal of evidence at trial that otherwise would have been inadmissible. In particular, the charge enabled the government to prosecute petitioner and Manrich jointly as co-conspirators, even though there was no indication that they even knew of each other's existence before trial. Charging the case as a conspiracy also enabled the government to present evidence offered to show that petitioner made additional referrals to the repair shop (that is, additional acts of substantive extortion) that were not charged in the indictment, as well as acts committed and statements made by other officers. *See* Pet. App. 18 n.11; *see also* JA 165, 170–71

(admitting evidence that Manrich admitted to being involved in a "conspiracy" and accepting "kickbacks"). The jury also heard extensive evidence about an occasion on which petitioner sent his own car to the shop for repair, and allegations that the repair shop owners fraudulently added damage to his car and then sought reimbursement for repairing that damage from petitioner's insurer, which in turn sought subordination of the claim from Erie Insurance Co. Pet. App. 12–13.

Before the trial court, petitioner repeatedly objected to the conspiracy charge and the government's underlying legal theory. Pet. App. 13–15. Petitioner argued that under the Hobbs Act, a defendant is guilty of conspiracy to commit extortion only if he and another person agree to a scheme to obtain property from "another"—that is, from a person outside the conspiracy. In support, petitioner cited the Sixth Circuit's decision in *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007) (Sutton, J.). *Brock* held that two supposed co-conspirators "did not agree, and could not have agreed, to obtain property from 'another' when no other person was involved—when the property went from one coconspirator to another." *Id.* at 767.

The evidence at trial showed at most that petitioner and the repair shop owners had agreed and exchanged money between themselves; the government offered no evidence that petitioner conspired to obtain property from "another" outside the conspiracy. Accordingly, before trial, petitioner proposed jury instructions directing the jury that it must acquit him if it found that "the only person or

persons from whom [he] conspired to obtain money were also members of the conspiracy." Pet. App. 14 n.9; *see also id.* at 30–31; JA 51–52. The government responded with a motion *in limine* seeking an order "precluding the defense from asserting or suggesting in any jury address that the government is required to prove that the defendants obtained money or property from a non-member of the charged conspiracy in order to prove the charges in this case." JA 57. The district court did not rule on either motion before trial.

At the close of the government's evidence, petitioner moved for a judgment of acquittal, reiterating his arguments under *Brock*. The district court denied the motion, *see* Pet. App. 42; JA 175–79, and concluded that petitioner's arguments were precluded by *United States v. Spitler*, 800 F.2d 1267 (4th Cir. 1986). JA 178–79.

In *Spitler*, a Maryland State Highway Administration official demanded and received "various items of value" from a corporation that performed highway-related services for the state. 800 F.2d at 1269, 1278–79. Russell Spitler, the corporation's vice president, had instructed his employees to accommodate the official's demands and, as a result of that conduct, was charged with conspiring to commit extortion. *Id.* at 1275. On appeal, Spitler argued that he could not be guilty of conspiracy to commit extortion because he had merely acquiesced in the official's extortionate demands. *See id.* The Fourth Circuit rejected that argument and upheld his conviction. In the Fourth Circuit's view, when a person "exhibits conduct more

active than mere acquiescence" in the face of a public official's extortionate demand "he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy." *Id.* at 1276. The court acknowledged that "[t]he degree of activity necessary for a purported victim of extortion to be a perpetrator of it, so that in reality he is not a victim but a victimizer" was a question "of no little significance." *Id.* at 1277 (internal quotation marks and citation omitted). Nonetheless, the Fourth Circuit concluded that it was unnecessary to "paint with a broad brush and declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator." *Id.* at 1278.

Applying *Spitler*, the district court rejected petitioner's arguments based on *Brock*, JA 178–79, as well as petitioner's proposed jury instructions, JA 190. Then, on the final day of trial, Manrich withdrew from the proceedings and pleaded guilty. Pet. App. 15. The district court instructed the jury that because Manrich's acts of extortion were charged as overt acts in furtherance of a common conspiracy, it could consider those acts when deliberating on the conspiracy charge against petitioner. JA 220; *see also* Pet. App. 18 n.11. The court also instructed the jury that it could consider the acts committed and statements made by petitioner's supposed co-conspirators, "even if such acts were done and statements were made in the [petitioner's] absence and without his knowledge." JA 219.

The jury found petitioner guilty on all counts, and the district court sentenced him to eighteen months of imprisonment and three years of supervised release. Pet. App. 15. It further ordered petitioner to make restitution under the Victim and Witness Protection Act, 18 U.S.C. § 3663. The court ordered him to pay $1,500 in restitution to the Baltimore Police Department—$300 for each of five separate acts of referring accident victims to the repair shop owners, including the three acts charged as substantive extortion counts plus two others that were not charged but about which the prosecution submitted evidence at trial. Pet. App. 32–37. Concluding that the fraudulent insurance claim was part of the conspiracy, the court also ordered petitioner to pay $1,870.58 in restitution to Erie Insurance. Pet. App. 15–16.

D. The Decision Below

Petitioner appealed his conviction and sentence. He argued that the district court erred by declining to grant his motion of acquittal on the conspiracy charge, and that his substantive extortion convictions required reversal because of the potential for "spillover prejudice." Ocasio CA4 Br. 20–22, 25–42. He also challenged the legal basis of the restitution award. *Id.* at 22–24, 42–53. In its brief on appeal, the government reiterated its theory that petitioner conspired to extort property from his co-conspirators, telling the Fourth Circuit that petitioner conspired "with the operators of a local automobile repair and towing company, Majestic Auto Repair Shop LLC to obtain cash payments" from those same operators. Gov't CA4 Br. 2.

In a published opinion, the Fourth Circuit affirmed, except that it vacated the restitution award to Erie Insurance. Pet. App. 25–28. The Fourth Circuit reaffirmed the approach it announced in *Spitler* and rejected the Sixth Circuit's holding in *Brock*. Pet. App. 19–25. In reaching that conclusion, the Fourth Circuit acknowledged that *Brock* "focused on the language of the Hobbs Act," reasoning that "an agreement to obtain 'property from another' [means] an agreement to obtain property from someone outside the conspiracy." Pet. App. 22 (quoting *Brock*, 501 F.3d at 767). It also recognized that the textual requirement that the conspirators agree to obtain "'property from another' and do so 'with his consent'" does not "appl[y] naturally to the conspirators' own property or to their own consent." *Id.* (quoting *Brock*, 501 F.3d at 768). Nonetheless, the Fourth Circuit concluded that the Hobbs Act's "from another" language "provides only that a public official cannot extort himself." Pet. App. 23. Accordingly, "a person like Moreno and Mejia, who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme, can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement." Pet. App. 22.

In the Fourth Circuit's view, *Spitler*'s active-participation standard ensures that the "consent" element does not make a conspiracy out of every act of extortion. Pet. App. 23–24. The court described *Spitler* as "recogniz[ing] the extremes of a spectrum of conduct ranging from 'mere acquiescence' (which is not punishable under conspiracy principles) to active solicitation and inducement" (which is). Pet. App.

20–21. Nonetheless, the Fourth Circuit again declined to identify when a payor participates actively enough to transform from an acquiescing victim into a guilty co-conspirator.

SUMMARY OF ARGUMENT

This Court should reverse the Fourth Circuit's decision. It cannot be reconciled with the text and structure of the Hobbs Act, and it is contrary to basic principles of federal criminal law.

I. The Hobbs Act imposes criminal liability on "whoever" conspires to commit "extortion" and defines extortion as the obtaining of property "from another, with his consent, under color of official right.' 18 U.S.C. § 1951(b). The natural and only plausible reading of the statute requires that the alleged conspirators agree among themselves to obtain property "from another"—that is, from someone outside the conspiracy. When the only property that changes hands is between the conspirators themselves—typically, between a public official and the private citizen who pays a bribe—the government has no authority to prosecute for conspiracy. Any fluent speaker of English would agree. If a public official proposes to a private citizen that they agree together to obtain property "from another," it would make no sense for the official to tell the citizen that the "another" he has in mind is that same citizen.

This straightforward reading is confirmed by the Hobbs Act's structure and the context in which the "from another" language appears. The Act imposes liability on "whoever" conspires to obtain property

from "another," making clear that the person who is punished cannot be the same person from whom the property is obtained. Similarly, the statutory requirement that the extortionate payment be "obtained" with the another's "consent" reinforces this reading. When two people merely exchange property between themselves, there is no sense in which they have conspired to obtain their own consent. It makes no sense to say that the victim of the conspiracy (the person who gives up his property) is also a conspirator (the person who agrees to obtain the property). Moreover, giving effect to the "from another" requirement avoids rendering practically irrelevant other federal statutes, such as 18 U.S.C. § 666, that carefully specify the circumstances under which the paying of bribes to state officials is prohibited by federal law.

Under a proper interpretation of the Hobbs Act, petitioner's conviction cannot stand. The government offered no evidence at trial that petitioner conspired with anyone to obtain property "from another." Instead, the government pursued the theory that petitioner conspired with the people who paid him to obtain property from the people who paid him. The district court should have granted petitioner's motion for acquittal or, failing that, the Fourth Circuit should have reversed his conviction.

II. The plain statutory text should have been the beginning and end of this case. Instead, the Fourth Circuit adopted an interpretation of the Hobbs Act that is contrary to the text and unpersuasive. The Fourth Circuit's interpretation effectively ignores the statute's "from another"

language, relying on the outlandish view that to bribe an official is to conspire with that official to victimize oneself. And it assumes that the payor of a bribe can be both the "whoever" who is punished and the "another" from whom property is obtained.

The Fourth Circuit offered no compelling reason to depart from the Hobbs Act's plain text. To the contrary, the relevant canons and available indicia of Congressional intent point in the other direction. For example, the Fourth Circuit's reading would turn every payment of a bribe to a public official into a conspiracy to commit extortion. But this Court has never construed the Hobbs Act to impose criminal liability on bribe *payors*, and nothing in the text of the Hobbs Act suggests that Congress intended that result. Similarly, the Fourth Circuit's interpretation would all but dissolve the distinction between substantive extortion and conspiracy to commit extortion. Every act of extortion under the Hobbs Act requires the victim's "consent," so the government would be able to turn almost every bribery case into a conspiracy, giving the government the benefit of generous evidentiary and joinder rules. And the Fourth Circuit's interpretation runs afoul of the principle that, unless Congress speaks clearly, a conspiracy provision should have different ingredients than the underlying substantive offense.

Historical evidence supporting a broad understanding of extortion conspiracies would likely be insufficient to overcome the textual and practical problems with the Fourth Circuit's interpretation. But even here, the Fourth Circuit came up short; neither it nor the government has pointed to any

support for the notion that someone can conspire to extort his own property in either historical practice or the purposes of the Hobbs Act. Early cases generally involved conspiracies to extort property from someone *outside* the conspiracy. And Congress enacted the statute to address the problem of labor racketeering, not to grant the federal government sweeping authority to prosecute private citizens accused of bribing state officials.

Finally, if any doubt remained concerning the problems with the Fourth Circuit's interpretation, well-settled federalism and lenity principles provide the final nails in the coffin. All fifty States already punish bribery, and absent clear and unmistakable language, Congress does not intend to extend the reach of federal criminal law into areas of traditional state concern. In any event, if there were ambiguity, the rule of lenity would require resolving it in favor of the accused.

III. Perhaps recognizing the problems caused by its atextual reading, the Fourth Circuit sought to avoid some of those troubling consequences by imposing an "active participant" limitation on conspiracy liability. Under that requirement, a defendant may be convicted of conspiring to obtain his own property—but only if he participates "actively" enough that he is not a victim of the extortion. That test has no basis in the Hobbs Act and is unworkably vague. Indeed, the Fourth Circuit essentially admitted as much, explicitly refusing to "declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to

prosecution. Pet. App. 21 (quoting *Spitler*, 800 F.2d at 1278).

This Court has consistently declined to replace clear statutory text with amorphous, judicially created standards, and the Fourth Circuit's refusal to explain the line between innocent and criminal conduct is inconsistent with basic due process principles. Because these difficulties are avoided by applying the Hobbs Act's plain text, the Fourth Circuit's active-participant requirement is a solution in search of a problem. The better course is to reject the Fourth Circuit's reading and to reverse the judgment below.

ARGUMENT

I. To Establish A Hobbs Act Conspiracy, The Government Must Prove That Two Or More People Agreed Among Themselves To Obtain Property From Another.

"In analyzing a statute," this Court "begin[s] by examining the text." *Carter v. United States*, 530 U.S. 255, 271 (2000); *see also, e.g.*, *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 741 (2014). Unless otherwise defined, statutory terms are "interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (internal quotation marks omitted); *see also Sandifer v. United States Steel Corp.*, 134 S. Ct. 870, 876 (2014). They should also be interpreted in context and in light of the statutory structure as a whole. *See Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014).

These basic rules of interpretation carry special force in the interpretation of criminal statutes, a context where vagueness and imprecision are to be avoided. A criminal statute must give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Smith v. Goguen*, 415 U.S. 566, 574 (1974) (criminal statute must draw "clear lines" between conduct that is prohibited and conduct that is not). Accordingly, courts should not "give the text a meaning that is different from its ordinary, accepted meaning." *Burrage v. United States*, 134 S. Ct. 881, 891 (2014).

In this case, the statutory text, structure, and common sense all point in one direction: The crime of conspiracy to commit extortion under the Hobbs Act requires that the government prove that the alleged conspirators agreed among themselves to obtain property from a person outside the conspiracy.

A. The Statute's Plain Text Requires An Agreement To Obtain Property From Someone Outside The Conspiracy.

The Hobbs Act punishes "whoever" commits "extortion or attempts or conspires so to do," and defines extortion as "the obtaining of property *from another*, with his consent, under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). As the Sixth Circuit has concluded, the natural reading of that language forecloses the possibility of a Hobbs Act conspiracy between a public official and the payor of a bribe or other illicit payment. *See Brock*, 501 F.3d at 767–71. Two people can conspire to commit extortion under color of official right only if they

agree to obtain property "from another" person outside the conspiracy. When two people merely agree to exchange property between themselves, they have not agreed to obtain property "from another." Their agreement does not concern "another" at all—only themselves.

This straightforward reading is consistent with the common, contemporaneous understanding of the language that Congress chose when it enacted the Hobbs Act. The term "another" was understood to mean (just as it means today) one more person or thing *in addition* to those already identified. *See, e.g.*, Oxford English Dictionary 348 (1933) ("[o]ne more, one further"); Webster's New International Dictionary 110 (2d ed. 1934) ("[o]ne more; a second or additional one"; "[a]ny or some other; any different person, indefinitely; any one or thing else; some one or thing else "). And "to conspire" was understood (as it still is) to refer to two or more people agreeing to do something against the law. *See, e.g.*, Oxford English Dictionary 870 (defining "conspiracy" as "an agreement between two or more persons to do something criminal, illegal, or reprehensible"). A conspiracy to commit extortion under the Hobbs Act thus requires a wrongful "agreement between two or more persons" to obtain property from "[o]ne more," "[o]ne further," or "an additional one"—in other words, an agreement to obtain property from someone other than the conspirators themselves.

Interpreting the statute any other way would make no sense. *Cf. Dowling v. United States*, 473 U.S. 207, 216 (1985) (adopting interpretation consistent with "common-sense meaning of the

statutory language"). If two people agree that one will pay the other a bribe, no speaker of English would say that they have agreed to "obtain property from another, with his consent." Imagine such a conversation: John, a policeman, says to Susan, a civilian, "Let us agree to obtain money from another, by getting that person's consent through use of my right and authority as a public official." Susan then asks, "Who did you have in mind?" If John were to answer, "Oh, I meant *you* should pay me," Susan would rightly be confused. No one speaks that way—and there is no reason to think Congress spoke that way when enacting a criminal statute.

B. Context And Structure Confirm What The Statute's Plain Text Requires.

Reading the statute by its plain terms to require that the parties agree to obtain property from someone outside the conspiracy is reinforced by the Hobbs Act's structure and the context in which the "from another" language appears.

The Act imposes criminal liability only on parties who conspire "[to] obstruct[], delay[], or affect[] commerce" by "obtaining of property from another, with his consent, under color of official right." 18 U.S.C. § 1951(a), (b)(2). But when a public official and a citizen merely agree to *exchange* property between themselves, it cannot be said that both parties are agreeing to *obtain* the property. As this Court has noted, "[o]btaining property requires that the *victim* 'part with' his property and that the *extortionist* 'gain possession' of it." *Sekhar*, 133 S. Ct. at 2725 (emphasis added; citations omitted). A party cannot at the same time be both a victim of an

extortion conspiracy (the party who parts with his rightful property) and also one of the conspiratorial extortionists (the party who conspires with others to wrongly obtain possession of the same property). *Cf.* 18 U.S.C. § 3771 (giving "crime victims" rights to confer with prosecutors and to testify at plea, sentencing, and parole hearings).

To the contrary, because the Act punishes "whoever" conspires to obtain property from "another," it makes clear that the "whoever" and the "another" must be *different* people. If the payor of a bribe could be convicted of conspiring to commit extortion, he would be both the "whoever" who is punished as well as the "another" from whom property is obtained. There is no reason to conclude that Congress intended such a linguistic mess.

The Act also requires that an extortionate payment be obtained "with [the payor's] consent." When two people agree to exchange property between themselves, however, it makes no sense to say that they have conspired to obtain their own consent. "How do (or why would) people conspire to obtain their own consent?" *Brock*, 501 F.3d at 767. Indeed, "[t]he context in which the consent requirement appears confirms that it must be taken seriously." *Id.* at 767; *see also Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (holding that statutory language should be interpreted in context) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). "The Hobbs Act prohibits not only extortion but robbery as well; what separates the two is the payor's consent," meaning that "[f]ailure to respect the consent

requirement blurs the line between robbery and extortion." *Brock*, 501 F.3d at 767–68.

Moreover, interpreting the Act according to its plain terms avoids rendering Congress's separate bribery statutes superfluous. *See Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010) ("[T]he canon against interpreting any statutory provision in a manner that would render another provision superfluous applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times."). It also avoids overriding the specific limits Congress has placed on federal bribery statutes, contrary to the fundamental canon that the specific controls the general. *See, e.g.*, *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991).

When Congress has chosen to criminalize paying bribes to state and local officials, it has carefully specified the required circumstances. For instance, if the government pursues a bribery charge against a state official under 18 U.S.C. § 666, it must meet certain burdens: The statute requires proof that the defendant gave something of value to a public official while "intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more." *Id.* § 666(a)(1)(B). The government must prove that the "State, local or Indian tribal government, or any agency thereof" that employed the public official "receive[d], in any one[-]year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal

assistance." *Id.* § 666(b). And upon proving those requirements, the maximum penalty available is ten years' imprisonment. *Id.* § 666(a).

Significantly, Congress enacted § 666 in 1984—nearly four decades after the Hobbs Act. *See* Pub. L. No. 98-473, § 1104, 98 Stat. 1837, 2143 (Oct. 12, 1984). There is no reason Congress would have gone to the trouble if all of the conduct covered by § 666 (and more) was already made criminal via Hobbs Act conspiracy liability. Instead, the Hobbs Act and § 666 sensibly co-exist because the Hobbs Act authorizes federal prosecutions of only corrupt public officials and, in limited circumstances, the private citizens (or other officials) who conspire with those officials to obtain property from parties outside the conspiracy.

C. Under The Correct Interpretation Of The Hobbs Act, Petitioner's Conviction Cannot Stand.

The text, structure, and context of the Hobbs Act should have been sufficient to resolve this case. At trial, the government failed to prove that petitioner conspired with anyone to obtain property "from another"—that is, from someone outside the conspiracy. Instead, the government's theory was that petitioner conspired with Moreno and Mejia to extort property from Moreno and Mejia. As a result, petitioner should have been acquitted of the charge of conspiracy to commit extortion as a matter of law. Failing that, the Fourth Circuit should have reversed his conspiracy conviction, while also reversing his substantive extortion convictions in light of the undeniable potential for spillover prejudice due to the

admission of highly prejudicial evidence solely because of the conspiracy charge. Absent the conspiracy charge, petitioner could not have been tried jointly with Manrich—with whom he had no connection other than the government's assertion that both had conspired with Moreno and Mejia to extort Moreno and Mejia. *See* Fed. R. Crim. P. 8(b); *see also United States v. Lane*, 474 U.S. 438, 447 (1986) (noting that "joinder under Rule 8 [was] proper" when an indictment "charged all the defendants with one overall count of conspiracy").

Perhaps recognizing the problems with the way the government chose to frame and litigate its case, the Fourth Circuit mused in a footnote that petitioner's co-conspirators could have been other police officers (not the repair shop owners), thereby curing the problem with the conspiracy charge. *See* Pet. App. 25 n.14. But that effort to save the government from itself—raised *sua sponte* and for the first time by the Fourth Circuit—is flatly inconsistent with the way the government framed and litigated its case. The government did not argue that Moreno and Mejia were outside the conspiracy. Far from it; in the government's view, Moreno and Mejia were integral to the conspiracy from the very beginning.

The conspiracy count alleged that petitioner "'agree[d] with other [police officers], *and with Moreno and Mejia* to unlawfully obtain under color of official right, money and other property *from Moreno, Mejia, and [the Majestic Repair Shop]*, with their consent.'" Pet. App. 4 (quoting JA 36) (emphasis added). Under any fair reading, the

indictment alleged a conspiracy that included an agreement with Moreno and Mejia—the alleged bribe-payors—to obtain property from them (and not from anyone else). *See* JA 36; Pet. App. 4. Moreover, the government focused its case-in-chief on proving that petitioner had conspired with Moreno and Mejia to obtain property from Moreno and Mejia—that is, that the two men were both petitioner's co-conspirators and also the victims from whom property was supposedly obtained. *See, e.g.*, JA 64–66; JA 95–98. Indeed, the government was so confident in its reading of the statute that it moved *in limine* to preclude petitioner from arguing that the jury needed to find that he sought to obtain property from someone outside the conspiracy. JA 57–62. And on appeal, the government continued to argue that petitioner's co-conspirators were Moreno and Mejia. *See* Gov't CA4 Br. 2.

Even if the jury could have convicted petitioner on the basis of a theory that bears no resemblance to the one the government advanced at trial, what matters for present purposes is that the jury *could have* convicted petitioner on the basis of a conspiracy that included Moreno and Mejia (and almost surely did so). "[C]onstitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that *may rest on a legally invalid theory*." *Skilling v. United States*, 561 U.S. 358, 414 (2010) (emphasis added). The Fourth Circuit must have understood this, which may explain why it relegated its police-officer-only theory to a footnote.

II. The Fourth Circuit's Reasons For Departing From The Hobbs Act's Plain Terms Are Unpersuasive.

The Fourth Circuit should have started and ended its analysis with the plain text of the Hobbs Act. Instead, the Fourth Circuit credited the government's theory that petitioner could be guilty of conspiring *with* the owners of the repair shop to extort property *from* the same repair shop owners. This reading has innumerable problems that only underscore why failing to enforce the statutory text was a mistake.

A. The Fourth Circuit's Reasoning Is Inconsistent With The Statute's Plain Text.

According to the Fourth Circuit, the statute's "from another" language "provides only that a public official cannot extort himself." Pet. App. 23. But no statutory language is needed to confirm the metaphysical impossibility of paying oneself a bribe with one's own money. By making proof of a mere obtaining of property sufficient for a Hobbs Act conspiracy, the government's interpretation erases the requirement of obtaining property "from another." That alone should be cause to reject the Fourth Circuit's interpretation. *See Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994) ("Judges should hesitate to treat statutory terms in any setting [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense."); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is [this Court's] duty to give effect, if

possible, to every clause and word of a statute.") (internal quotation marks omitted).

With no answer to these basic textual problems, the government has tried to muddy the waters. At the certiorari stage, the government asserted that "if a bribe-payor can be 'another' for purposes of a substantive Hobbs Act violation, it is difficult to see how that same person can lose his status as 'another' solely by virtue of a conspiracy charge. Opp. 8. According to the government, the Hobbs Act "itself proscribes not just interfering with commerce by extortion but also 'conspir[ing] so to do,' which suggests that 'property from another' and 'with his consent' mean the same thing both in substantive and in conspiracy cases." *Id.*

Instead of offering a persuasive reading of the statutory text, the government is merely playing games with words. The phrase "from another" refers to the bribe-payor in both the substantive crime and conspiracy contexts, as the bribe-payor is, by definition, the one from whom property is obtained. But the bribe-payor does not "lose[] his status as 'another'" when he is charged with conspiracy. Instead, the point is that the bribe-payor cannot be *both* a conspirator and the "another" from whom the conspirators wrongly obtain property. If the bribe-payor could occupy both roles, then he could be guilty of conspiring to obtain property from himself, not "from another" as the statute requires.

B. The Fourth Circuit's Reasoning Is Inconsistent With Basic Interpretive Principles.

Because the Hobbs Act's text is clear, there is no need to turn to other canons of construction, for they "are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others"—namely, the canon that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Id.* at 254 (internal quotation marks omitted).

Even if the text were not clear, however, the Fourth Circuit's interpretation suffers from other insurmountable interpretive difficulties: It creates a broad prohibition on *paying* bribes by transforming every payment of a bribe into a conspiracy to commit extortion; it turns every act of receiving a bribe into a conspiracy to extort; and it finds no support in any indicia of Congressional intent.

1. The Fourth Circuit's Approach Creates A Broad Prohibition On Paying Bribes.

In failing to adhere to the statutory text, the Fourth Circuit's interpretation transforms the Hobbs Act into an all-purpose bribery statute that imposes criminal liability not only on public officials who take

bribes but also on private citizens who pay them. Consider how the conspiracy provision might work in a typical case involving bribery. By accepting a bribe, a public official commits extortion under color of official right. *See Evans*, 504 U.S. at 268. That transaction, by definition, involves an agreement between the public official and the bribe-payor, because the payment is made "*in return for* official acts." *Id.* (emphasis added). If, as the Fourth Circuit has concluded, no proof of an agreement to obtain property from someone outside the conspiracy is necessary, *every* payment of a bribe is also, by definition, a conspiracy to commit extortion under color of official right. By agreeing to the bribe, the public official and the bribe-payor are necessarily agreeing to a scheme in which the public official obtains the bribe-payor's money or other property in violation of the Hobbs Act.

Interpreting the Hobbs Act to provide this sort of duplicative criminal coverage makes little sense. Among other things, it would dramatically expand the statute's reach far beyond conduct constituting the substantive crime of extortion. This Court has never construed the Hobbs Act to impose criminal liability on the *payor* of a bribe, and not even the government would contend that the substantive offense of extortion directly encompasses the *paying* of bribes to public officials. *Cf. McCormick v. United States*, 500 U.S. 257, 280 (1991) (Scalia J., concurring) ("[W]here the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion—and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am

aware of) it punishes not only the person receiving the payment but the person making it."). Yet if a public official can be convicted of conspiring with a private citizen to obtain that citizen's own property, then the private citizen can also be convicted for participating in the same conspiracy. *See Brock*, 501 F.3d at 768.

There is no reason to think that Congress intended the statute to effect such an extraordinary expansion in federal law. "Having opted not to punish the giving of bribes directly, Congress should not be treated as having prohibited them through the sleight of indictment of an extortion conspiracy." *Id.*; *cf. N.Y. Tel. Co. v. N.Y. State Dep't of Labor*, 440 U.S. 519, 537–38 (1979) (when Congress "explicitly" proscribes conduct and yet is silent with respect to closely related conduct, the absence of such a proscription is a "strong indication that Congress did not intend" to proscribe the latter conduct).

When Congress has passed statutes forbidding payments to public officials—as it has many times—it has legislated with much greater care and precision. *Cf. Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice"). For example, Congress has made it an offense to "give[], offer[] or promise[] anything of value" to a federal official. 18 U.S.C. § 201(b)(1). It has criminalized "pay[ing] or offer[ing] or promis[ing] any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any

appointive office or place under the United States for any person." *Id.* § 210. It has forbidden "an officer, director, or employee of a financial institution" to loan or give money to a federal examiner "who examines or has authority to examine such institution. *Id.* § 212(a). And it has proscribed compromising the security of "any secure or restricted area or seaport" by "corruptly giv[ing], offer[ing], or promis[ing] anything of value to any public or private person." *Id.* § 226(a)(1).

Similarly, Congress has delineated with care the circumstances under which federal prosecutions of state officials for bribery may be appropriate. Consider, for example, the specific requirements Congress imposed under 18 U.S.C. § 666 for prosecuting bribe-payors, discussed above, and why the Hobbs Act—unleashed from its textual moorings—is a much more potent prosecutorial tool. The government would have no need to prove that the improper payment was made to influence the state official in connection with transactions involving $5,000 or more in value, *see* 18 U.S.C. § 666(a)(2); rather, under the Hobbs Act, simply proving that the agreed-on payment was to be made in exchange for official action would be enough. *See Evans*, 504 U.S. at 268. Nor would the government need to show that the relevant governmental unit accepted any federal benefits, *see* 18 U.S.C. § 666(b), for the Hobbs Act contains no such jurisdictional requirement. Moreover, violations of the Hobbs Act carry a maximum penalty of twenty years in prison, double that available under § 666.

The Hobbs Act thus offers federal prosecutors significant advantages over § 666—and perhaps most importantly, it serves as a more powerful *in terrorem* weapon for obtaining guilty pleas given its higher maximum penalty. In light of all the benefits of charging under the Hobbs Act, what rational prosecutor would ever charge under § 666 if Hobbs Act conspiracies were interpreted to encompass all the same territory (and more)? Perhaps the answer is that the rational prosecutor would charge *both* crimes, in order to make it all the easier to obtain a guilty plea. *Cf. United States v. Santos*, 553 U.S. 507, 516 (2008) (plurality op.) ("Prosecutors, of course, would acquire the discretion to charge the lesser lottery offense, the greater money-laundering offense, or both—which would predictably be used to induce a plea bargain to the lesser charge."). But while federal prosecutors surely appreciate having as many plea-bargain-inducing tools as possible, there is no reason to conclude that was Congress's intent when it enacted the Hobbs Act.

Interpreting similar criminal provisions, this Court has recognized that "a narrow, rather than a sweeping, prohibition is more compatible with the fact that" each federal prohibition on improper payments to public officials is only "one strand of an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 409 (1999); *see also Sabri v. United States*, 541 U.S. 600, 605 (2004); *Fischer v. United States*, 529 U.S. 667, 681 (2000) (rejecting interpretation that "would turn almost every act of bribery into a federal

offense, upsetting the proper federal balance"). In short, because "this is an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Sun-Diamond*, 526 U.S. at 412.

Against this backdrop, the Fourth Circuit's decision should not be allowed to render the Hobbs Act a meat axe sharpened for federal use against all bribery of state and local officials. Indeed, the Fourth Circuit's approach disregards another fundamental interpretative principle; namely, that the Hobbs Act, like all federal criminal statutes, does not grant courts authority to create a federal common law of crimes, or to enforce vague criminal law standards that would effectively authorize the substitution of prosecutorial and judicial judgments about who is a bad actor for Congress's judgments about the elements of criminal offenses. "[U]nder our constitutional system federal crimes are defined by statute rather than by common law." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001); *see also United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."). This Court has accordingly rebuked parties, including the government, for efforts to strain the text of the Hobbs Act beyond what it can bear. *See, e.g.*, *Scheidler*, 547 U.S. at 16; *Scheidler*, 537 U.S. at 409; *McCormick*, 500 U.S. at 271–74; *United States v. Enmons*, 410 U.S. 396, 410–12 (1973).

2. The Fourth Circuit's Approach Turns Every Act Of Receiving A Bribe Into A Conspiracy To Commit Extortion.

The Fourth Circuit's approach also all but dissolves the longstanding distinction between a substantive offense and a conspiracy to commit that offense. To secure a conviction for substantive extortion under the Hobbs Act, the government must prove that the bribe-payor "consent[ed]," 18 U.S.C. § 1951(b)(2); in other words, the government must establish that the bribe-payor and the public official *agreed* to exchange property between themselves. But "[t]he essence of the crime of conspiracy is *agreement*." *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (emphasis added). The Fourth Circuit's interpretation thus allows the government to add, or threaten to add, a charge of conspiracy to practically every indictment alleging substantive Hobbs Act extortion, even when precisely the same conduct forms the basis of both charges.

Undermining the Hobbs Act's distinction between extortion and conspiracy to commit extortion would open the door for prosecutors to employ, just as they did below, the extremely potent evidentiary and party-joinder rules that conspiracy charges make available. *See, e.g.*, Fed. R. Evid. 801(d)(2)(E) (providing that statements "made by the party's coconspirator during and in furtherance of the conspiracy" are admissible against the party); *United States v. Inadi*, 475 U.S. 387, 398–99 (1986) (noting that the "co-conspirator rule apparently is the most frequently used exception to the hearsay rule"). But

it has been "long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). Where the conspiracy presents no danger greater than the substantive offense—that is, "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime"—a defendant cannot be convicted for both. *Id.*

In *Callanan v. United States*, the Court made clear that the treatment of conspiracy and substantive offenses as distinct crimes is a basic "presupposition" of the Hobbs Act. 364 U.S. 587, 594 (1961). Rejecting the defendant's argument that Congress did not intend to allow cumulative punishments for both extortion and conspiracy to extort, the Court concluded that cumulative punishment was permissible because the case involved "a defendant convicted of violating two separate provisions of a statute, whereby Congress defined *two historically distinctive crimes composed of differing components*." *Id.* at 597 (emphasis added). That is, the "presupposition" that the Hobbs Act's substantive and conspiracy provisions necessarily define distinct and separate offenses with different elements was critical to the Court's conclusion that Congress intended to permit cumulative punishment for both offenses. And indeed, the defendant in *Callanan*, unlike petitioner here, had conspired to extort property from a company *outside* the conspiracy. *See id.*; *Callanan v. United States*, 274 F.2d 601, 602 (8th Cir. 1960).

In any event, if Congress had intended to permit cumulative punishment for the same conduct as both substantive extortion and conspiracy to commit extortion, it would have spoken clearly and unmistakably. *Cf. Iannelli*, 420 U.S. at 791 (finding that "the history and structure of the Organized Crime Control Act of 1970 manifest a clear and unmistakable legislative judgment" that the substantive offense and conspiracy should be punished cumulatively). Neither the Fourth Circuit nor the government has pointed to any evidence that Congress here clearly and unmistakably authorized double punishment for identical conduct. Instead, the more natural conclusion is that Congress provided conspiracy liability to account for blameworthy conduct that would otherwise go unpunished—such as when a private citizen assists a public official in obtaining property from some other person.

3. The Fourth Circuit's Approach Finds No Support In The History Of The Hobbs Act.

The Fourth Circuit's view also finds no support in the background of the Hobbs Act. *See Sekhar*, 133 S. Ct. at 2724–26) (consulting the common law meaning of the relevant terms). Common law cases support what the Hobbs Act's plain text requires, and neither the government nor the Fourth Circuit has identified any relevant common-law practice to the contrary. *See Wilkie v. Robbins*, 551 U.S. 537, 564 n.12 (2007) (noting that there is "no basis for believing that Congress thought of broadening the

definition of extortion under color of official right beyond its common law meaning").

Early English decisions addressing conspiracies to extort appear to have generally involved agreements between two or more people to obtain property from some other person. *See, e.g.*, *Dominus Rex v. Kinnersley & Moore*, 93 E.R. 467, 467 (K.B. 1718) ("defendants Kinnersley and Moore, being evil disposed persons, in order to extort money from my Lord Sutherland, did conspire together to charge my lord with endeavouring to commit sodomy with the said Moore"); *The King v. Kimberty & Mary North*, 83 E.R. 297, 297 (K.B. 1661) ("[Kimberty and Mary North] were indicted for conspiring to indict J.S. with intent to extort money from him."). Early state court cases involving conspiracies to commit extortion under color of official right are similar. *See, e.g.*, *People v. Braun*, 303 Ill. App. 177, 178 (1940) ("officials of the village of Dixmoor, Illinois were charged with conspiring unjustly and oppressively to extort money from motorists"); *Commonwealth v. Kirk*, 141 Pa. Super. 123, 127–28 (1940) (the "Secretary of Highways" and the "Chief Engineer of the Department of Highways conspired to extort bond business and moneys from contractors engaged in the performance of highway construction contracts").

The state statute that formed the genesis of the Hobbs Act likewise provides no support for the Fourth Circuit's decision. The Hobbs Act "was modeled after § 850 of the New York Penal Law (1909), which was derived from the famous Field Code, a 19th-century model penal code." *Sekhar*, 133

S. Ct. at 2724 (citing 4 Commissioners of the Code, Penal Code of the State of New York § 613, at 220 (1865) (reprint 1998)). Congress "borrowed, nearly verbatim, the New York statute's definition of extortion." *Id.* Early New York cases addressing extortion conspiracies appear to have involved at least two people who agreed to obtain property from another person. *See, e.g.*, *People v. Kay*, 105 N.Y.S.2d 687, 688 (App. Div. 1951) (per curiam) (police officers conspired with two civilians to "extort[] certain English pounds" from other people after a traffic stop); *In re Stephens*, 203 N.Y.S. 500, 504–05 (App. Div. 1924) (defendant, "in conspiracy with the district attorney, extorted the sum of $20,500 from the Emerson Motors Company as a fee for undertaking to use his personal influence with the district attorney to save the company from indictment"); *People v. Olson*, 15 N.Y.S. 778, 778 (Sup. Ct. 1891) (defendant contractors were charged "with the crime of conspiracy, in attempting to cheat and defraud the city of Buffalo out of a sum of money").

Nor is there anything in the Hobbs Act's history to suggest that Congress was seeking to enact, through the indirect means of conspiracy liability, a federal prohibition on the paying of bribes. "The present form of the statute is a codification of a 1946 enactment, the Hobbs Act, which amended the federal Anti-Racketeering Act." *Evans*, 504 U.S. at 261. Congress enacted the Hobbs Act to overrule this Court's interpretation of the Anti-Racketeering Act in *United States v. Local 807 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America*, 315 U.S. 521 (1942), which the Act's supporters thought "had mistakenly exempted

labor from laws prohibiting robbery and extortion.' *Evans*, 504 U.S. at 263; *see also* H.R. Rep. No. 79-238, at 1–10 (1945). The debates in Congress thus focused on crafting the Hobbs Act to prohibit labor "racketeering" while still permitting "legitimate" labor activity. *See, e.g.*, 91 Cong. Rec. 11,910 (1945) (remarks of Rep. Springer) ("To my mind this is a bill that protects the honest laboring people in our country."); *id.* at 11,912 (remarks of Rep. Jennings) ("The bill is one to protect the right of citizens of this country to market their products without any interference from lawless bandits."). There is nothing to suggest that Congress intended the Hobbs Act to grant federal prosecutors the sweeping authority allowed by the Fourth Circuit's decision below.

C. The Fourth Circuit's Approach Is Inconsistent With Principles Of Federalism And Lenity.

If any further reasons to reject the Fourth Circuit's reading were needed, principles of federalism provide them. This Court has rightfully been reluctant to "federalize much ordinary criminal behavior that typically is the subject of state, not federal, prosecution." *Scheidler*, 547 U.S. at 20. As Justice Kagan recently recognized, the federal criminal code is in many respects "too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion." *Yates*, 135 S. Ct. at 1101 (Kagan, J., dissenting). Of course, "this Court does not get to rewrite the law." *Id.* But neither does the Executive Branch. *See generally Utility Air*

Regulatory Grp., 134 S. Ct. at 2446 (government may not "rewrite clear statutory terms to suit its own sense of how the statute should operate").

Where, as here, there is no plausible textual support for the government's theory, the Court should not hesitate to reject the government's attempt to further extend the reach of federal criminal law into territory occupied by the States. As this Court has often noted, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Federalism concerns thus require that federal criminal statutes intruding on traditional state prerogatives be given a narrow construction unless Congress's contrary intent is "unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (internal quotation marks omitted). In short, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000) (internal quotation marks omitted); *see also Cleveland v. United States*, 531 U.S. 12, 24 (2000) (rejecting "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress").

If left uncorrected, the Fourth Circuit's Hobbs Act interpretation will transform every payment of a bribe to a state or local official into a federal conspiracy to commit extortion, thus displacing the

many state laws that already punish such bribery. *See, e.g.*, Md. Crim. Code § 9-201 (bribery of public employee). This Court has previously avoided interpretations of federal criminal law that "would turn almost every act of bribery into a federal offense" because doing so would "upset[] the proper federal balance." *Fischer*, 529 U.S. at 681 (interpreting 18 U.S.C. § 666). Similarly, here, the Hobbs Act does not speak with nearly enough clarity to justify such a dramatic shift in the balance between federal and state criminal laws.

Nor is there any sound policy justification for such a shift. This is not a situation where for structural reasons state and local prosecutors might be expected to under-enforce state criminal laws. Whatever concerns might exist regarding the willingness of state and local prosecutors to take on corrupt state and local officials do not apply to private citizens who pay bribes. As the vast network of state bribery statutes illustrates, the states are perfectly capable of policing that type of misconduct themselves. *See* George D. Brown, *Should Federalism Shield Corruption?—Mail Fraud, State Law and Post-*Lopez *Analysis*, 82 Cornell L. Rev. 225, 275 & n.431 (1997) (listing the bribery statutes in all fifty States).

In any event, even if the government could overcome these federalism concerns, it cannot come close to showing that the terms of the Hobbs Act unambiguously support its position. In these circumstances, the rule of lenity requires resolving any uncertainty in petitioner's favor. As this Court has recognized, "[w]hen there are two rational

readings of a criminal statute, one harsher than the other," the rule of lenity instructs the Court "to choose the harsher only when Congress has spoken in clear and definite language." *Scheidler*, 537 U.S. at 409 (applying the rule of lenity to the Hobbs Act) (internal quotation marks omitted); *see also Skilling*, 561 U.S. at 411 (applying the rule of lenity to "resist the Government's less constrained construction absent Congress' clear instruction otherwise").

This rule is particularly relevant to conspiracy offenses, which pose a special risk to individual liberties. As Justice Jackson noted long ago, the "federal law of conspiracy" is an "elastic, sprawling and pervasive offense" and the "unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." *Krulewitch v. United States*, 336 U.S. 440, 445–46 (1949) (Jackson, J., concurring in judgment). Accordingly, this Court has "warned" that "attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions" should be met with "disfavor." *Grunewald v. United States*, 353 U.S. 391, 404 (1957).

The Fourth Circuit's interpretation does not come close to complying with these bedrock principles of lenity. Even if the statute did not clearly foreclose the government's position, there would be no basis for reaching the opposite conclusion—that Congress clearly criminalized conspiracies between bribe-payors and bribe-takers. The Hobbs Act is at best

ambiguous, for Congress did "not clearly criminalize paying bribes to public officials by the mere act of adding a conspiracy clause to the Hobbs Act. *Brock*, 501 F.3d at 768. For this reason too, the Fourth Circuit's decision should be reversed.

III. The Fourth Circuit's "Active Participant" Test Is Unworkable And Vague.

In an effort to prevent its interpretation from swallowing the distinction between the substantive crime and a conspiracy to commit that crime, the Fourth Circuit engrafted onto the Hobbs Act an amorphous test that provides for conspiracy liability only when the payor's participation in the conspiracy qualifies as sufficiently "active" to merit federal criminal punishment. According to the Fourth Circuit, someone who "actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement." Pet. App. 22. The court of appeals thus doubled down on its error by replacing a statutory requirement ("from another") with one found nowhere in the text. The court's fabricated test creates more problems than it is supposed to solve.

The most obvious problem with the Fourth Circuit's active-participant test is that it has no basis in the statutory text. *Accord Brock*, 501 F.3d at 771. The Hobbs Act refers to another's "consent" and does not draw any lines based on how active the "another" is in encouraging the public official to break the law or how enthusiastically the "another" parts with his property. As *Brock* put it, "[b]ecause all Hobbs Act

prosecutions require the 'consent' of the payor, it will be difficult to ascertain what level of enthusiasm, ambivalence or regret is required to escape prosecution." *Id.*

This Court has previously declined to read into the Hobbs Act additional elements beyond those appearing in its text. In *United States v. Culbert*, for example, the Court rejected a defendant's argument that the government had to prove not only that the defendant "violated the express terms of the Act, but also that "his conduct constituted 'racketeering.'" 435 U.S. at 372. The Court refused to read the statute that way, observing that "the absence of any reference to 'racketeering'—much less any definition of the word—is strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation." *Id.* at 373. Instead, as the Court observed, "the statutory language sweeps within it all persons who have 'in any way or degree . affect[ed] commerce by robbery or extortion.'" *Id.* (quoting 18 U.S.C. § 1951(a) (1976 ed.)).

A similar conclusion should follow here. Because the Hobbs Act already draws clear distinctions, "what warrant do [courts] have to draw several more on [their] own? Either the Act picks up all perpetrators, acquiescors and victims, or it picks up none of them." *Brock*, 501 F.3d at 771. And while the Fourth Circuit may have crafted its active-participant requirement with the goal of protecting less blameworthy individuals from punishment, this Court has made clear that judges have no license to create exceptions to federal criminal laws that have no basis in the text. *See Brogan v. United States*, 522

U.S. 398, 406 (1998) (rejecting argument that "criminal statutes do not have to be read as broadly as they are written, but are subject to case-by-case exceptions"). The Fourth Circuit's creativity is especially unjustified given that it is necessary only because the court refused to apply the language of the statute as written. A court should not invent an *unwritten* element of a criminal statute ("actively participates") to solve problems resulting from its failure to apply a *written* one ("from another").

Even if the active-participant standard had some textual pedigree, however, it still ought to be rejected because it is unworkable and hopelessly vague. "To satisfy due process, 'a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.'" *Skilling*, 561 U.S. at 364 (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The active participant test, set against the backdrop of preexisting requirements of agreement and consent, satisfies neither of these requirements.

Seemingly unconcerned about these problems, the Fourth Circuit expressly declined to "declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator." *Spitler*, 800 F.2d at 1278; *see also* Pet. App. 21. But a criminal statute that establishes no readily drawn line, bright or otherwise, between innocent and guilty conduct is fundamentally inconsistent with due process. "How

can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?" *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). This Court has been careful to interpret federal criminal statutes to avoid such vagueness concerns. *See, e.g.*, *Skilling*, 561 U.S. at 403–04. Indeed, one reason the Court refused to read an unwritten racketeering element into the Hobbs Act was that doing so "might create serious constitutional problems, in view of the absence of any definition of racketeering in the statute." *Culbert*, 435 U.S. at 374. Fortunately, here, as in *Culbert*, this Court "need not concern [itself] with these potential constitutional difficulties because a construction that avoids them is virtually compelled by the language and structure of the statute." *Id.*

Perhaps recognizing the vagueness problems inherent in the Fourth Circuit's made-up test, the government has tried to rescue it by suggesting that active participation "is essential to the formation of a conspiracy." Opp. 9. According to the government, the Fourth Circuit's test should be read to inquire "whether a defendant is simply complying with an official demand—or is instead becoming a conspirator by knowingly participating in the criminal agreement." *Id.* But even after this rescue mission, the government is left stuck between a rock and a hard place. Under its view of "active participation," virtually every substantive extortion offense also constitutes an additional conspiracy to commit extortion, for the Hobbs Act's "with his consent" requirement for substantive extortion ensures that

every bribe-payor is "knowingly participating in the criminal agreement." Simply put, if "active participation" is to add something substantial, and thus make up for the loss of the statutory element requiring wrongfully obtaining property "from another," then it must require something beyond a knowing agreement to make a *quid pro quo* payment to a public official. But neither the Fourth Circuit nor the government has explained what this additional element might be.

At bottom, an "active participant" test is well crafted in one sense only: it allows prosecutors and courts to punish "conspiracy" whenever they conclude by their own lights that a payor is a malefactor and to avoid imposing such punishment whenever they conclude a payor is blameless. But this advantage, such as it is, is also the test's fatal flaw. Under our system of justice, "[b]ad men, like good men, are entitled to be tried and sentenced in accordance with law." *Sorich*, 129 S. Ct. at 1208 (Scalia, J., dissenting from denial of certiorari) (quoting *Green v. United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting)). Respecting criminal law as law requires enforcing statutory text as it is written instead of allowing courts to make "case-by-case exceptions" based on their own assessment of blameworthiness. *Brogan*, 522 U.S. at 406.

CONCLUSION

The decision of the Fourth Circuit should be reversed, and the case should be remanded for further proceedings.

June 1, 2015

Respectfully submitted.

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UNITED STATES OF AMERICA

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FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Hobbs Act defines extortion to include "the obtaining of property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2). The question presented is:

Whether a conviction under the general federal conspiracy statute, 18 U.S.C. 371, may be based on Hobbs Act extortion where a public-official defendant has formed an agreement to obtain property from someone within the conspiracy.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 750 F.3d 399.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2014. A petition for rehearing was denied on May 28, 2014. On July 18, 2014, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 25, 2014, and the petition was filed on that date. The petition was granted on March 2, 2015. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on one count of conspiring to interfere with commerce by extortion under the Hobbs Act, in violation of 18 U.S.C. 371, and three counts of interfering with commerce by extortion, in violation of the Hobbs Act, 18 U.S.C. 1951(a). Pet. App. 46, 51. The district court sentenced petitioner to 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at 47-48, 52-53. The district court also ordered petitioner to pay $3,370.58 in restitution. *Id.* at 15-16; C.A. App. 1472. The court of appeals affirmed petitioner's convictions, Pet. App. 16-25, but vacated the restitution order in part and remanded for further proceedings concerning restitution, *id.* at 28-29. On remand, the district court amended the judgment and ordered restitution of $1500. *Id.* at 53-54.

1. a. Hernan Alexis Moreno Mejia (known as Alex Moreno) and Edwin Javier Mejia (known as Edwin Mejia), who are brothers, co-owned and operated a Baltimore-area car repair shop called Majestic Auto Repair Shop, LLC (Majestic).[1] Pet. App. 2. In 2008, Majestic did not "have a high volume of cars coming" in for repairs. J.A. 95. Accordingly, the shop's owners struck a deal with Officer Jhonn Corona of the Baltimore Police Department (BPD): Officer Corona would send car accident victims to Majestic for repairs; in return, Majestic would pay Officer Corona a kickback of $150 per vehicle. J.A. 95-96, 150.[2]

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[1] Majestic was originally a limited liability company but became a corporation in 2010. C.A. App. 655-656, 736; see J.A. 145.

[2] That practice violated BPD policy in at least two ways. First, BPD regulations prohibited officers from "solicit[ing] or

Officer Corona spread word to other BPD officers, who joined the scheme and collected between $150 and $300 for each car referred to Majestic. J.A. 96; Pet. App. 6. Some officers even set up a referral "network," through which they would receive a portion of another officer's kickback as a fee for "recruiting" that officer into the scheme. J.A. 126, 129. Between 2008 and 2011, as many as 60 BPD officers received payments from Majestic. J.A. 96.

As Moreno later explained, the kickback scheme allowed for a "beneficial" division of labor. J.A. 97. When car accidents occur, "the first people to go to the scenes" are police officers; for that reason, the participating officers were well positioned to ensure that damaged cars were sent to Majestic rather than to another shop. *Ibid.* If a car was still drivable, Moreno or Mejia would create a phony towing record "to prove to the insurance company that [the] car was actually damaged before it got to the shop." J.A. 152-153. Once the car was at the shop, Moreno often caused additional damage—in order to ensure that the repairs were reimbursable according to insurance "protocols" (J.A. 101-102, 107), and to conform the damage to police accident reports, which the participating officers fabricated to increase insurance reimbursements (J.A. 139). Payments from insurance companies were deposited directly into Majestic's

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accept[ing]" any "compensation[], reward, gift or other consideration * * * without special permission of the police commissioner." C.A. App. 209; see Pet. App. 6. Second, for cars that needed towing, the BPD's towing procedures required investigating officers to contact, through dispatch, a pre-approved towing company that already had a contract with the City of Baltimore. Pet. App. 6-7; C.A. App. 213-214. Majestic was not such a company. J.A. 104; Pet. App. 7.

business account (J.A. 145-147, 149-150), and Moreno used the same account to make the payments to officers (J.A. 97-98, 149). Finally, Mejia would conceal these kickbacks on Majestic's books by categorizing them as "advertising and promotion." J.A. 158-159; see J.A. 150-151.

The scheme proved financially "beneficial" to Majestic, Moreno, and Mejia. J.A. 96. Once Moreno began paying the officers, the volume of Majestic's business "increased quickly" (J.A. 100), and its profits similarly grew (J.A. 110). Moreno and Mejia even argued about whether the shop was getting "too many" cars. J.A. 109. By January 2011, at least 90% of Majestic's business consisted of officer referrals. J.A. 100, 127.

b. In October 2007, the BPD hired petitioner as a police officer and assigned him to the night shift in south Baltimore. J.A. 75; C.A. App. 253. By May 2009, petitioner had learned of the kickback scheme from another BPD officer, likely Officer Leonel Rodriguez. J.A. 111-114; Pet. App. 7-8 & n.7. According to Moreno, Officer Rodriguez or another officer "recruited" petitioner for the scheme and put him in touch with Moreno. J.A. 136-137, 174; see J.A. 130.

On several occasions from May 2009 through about February 2011, petitioner persuaded accident victims to have their damaged cars towed to and repaired by Majestic. Pet. App. 7-8. Often petitioner would call Moreno from the scene of the accident to describe the vehicle—its make, model, age, and the extent of any damage. *Ibid.* Moreno preferred newer models because they were less likely to be written off by the insurance company as "a total loss." J.A. 105; see J.A. 124. Also preferable were cars with "full cover,"

meaning that "the car at fault was a luxury vehicle and that its insurer would pay for the damages." Pet. App. 9; see J.A. 106-107 (cars with deployed airbags were disfavored). If Moreno wanted a car, petitioner would convince the owner to have it towed to the shop. Pet. App. 8, 10. After referring a car to Majestic, petitioner would call Moreno and request a $300 payment, usually by the next afternoon. *Id.* at 8-12. Petitioner collected payments in person from Moreno at Moreno's home, an ATM, or a convenience store. *Id.* at 10-12.

Petitioner also used Majestic's services himself. Pet. App. 12-13. For example, when his wife was involved in a minor traffic accident, petitioner, at Moreno's suggestion, overstated the damage in a claim form filed with his insurer. *Id.* at 12; C.A. App. 393-395, 636-637. Moreno then caused additional damage to the car in a manner consistent with petitioner's description, repaired the damage, and billed petitioner's insurance company, which paid for the repairs and was later reimbursed by the other driver's insurer. Pet. App. 12-13; C.A. App. 393-398, 636-637. Moreno paid petitioner a $300 kickback for bringing his car to the shop and also covered his insurance deductible and car rental fees. Pet. App. 13; C.A. App. 399. Moreno explained at trial that he did so to "make [petitioner] happy" and to ensure that petitioner would "keep sending cars to Majestic." C.A. App. 399; see Pet. App. 13.

Finally, petitioner sought to bring other BPD officers into the scheme. See J.A. 125. Petitioner's goal was to "create a network" of officers who would give him a cut of every kickback they received from Majestic. J.A. 129; see J.A. 126 (petitioner sought to follow

the "example" of "officers [who] were making money off other officers"). Ultimately, petitioner recruited at least one other officer and put him in touch with Moreno. J.A. 138 ("I asked him if he knew about the cars. He stopped me right there. He was like no, no, no, I've already got it, Ocasio explained that to me."); see J.A. 172-173 (Moreno told the FBI that petitioner had recruited two other officers.).

2. In February 2011, after "an extensive investigation conducted by the BPD and the FBI" (Pet. App. 5), federal agents arrested Moreno, Mejia, petitioner, and several other BPD officers (C.A. App. 1030-1032). In March 2011, a grand jury in the District of Maryland indicted Moreno, Mejia, petitioner, and nine other BPD officers—including Officer Rodriguez, who had initially recruited petitioner into the kickback scheme. J.A. 24-32. Most of the officers pleaded guilty, as did Moreno and Mejia. Pet. App. 3 & n.2.

In October 2011, the grand jury returned a Superseding Indictment charging that petitioner and Officer Kelvin Manrich had conspired with other BPD officers and with Moreno and Mejia to interfere with commerce by extortion under the Hobbs Act, 18 U.S.C. 1951. J.A. 33-43. The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). Count One alleged a violation of the general federal conspiracy statute, 18 U.S.C. 371. J.A. 36-39. The "purpose of the conspiracy [was] for Moreno and Mejia to enrich over 50 BPD Officers, including [petitioner], and to benefit Moreno and Mejia by issuing payments to the BPD Officers in exchange for the BPD Officers' exercise of their offi-

cial positions and influence to cause vehicles to be towed or otherwise delivered to Majestic for automobile services and repair." J.A. 36-37. The Superseding Indictment also charged petitioner with three substantive counts of interfering with commerce by extortion, in violation of 18 U.S.C. 1951(a) (Counts 5, 6, and 7). J.A. 41-42.

Before trial, petitioner sought a jury instruction providing that the government, in order to convict him of conspiracy to violate the Hobbs Act, had to prove "that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy." J.A. 53. The government opposed the request and moved to preclude petitioner from making that argument to the jury. J.A. 57; see J.A. 61. The district court did not rule on either request before trial.

Petitioner and Officer Manrich were tried together. Pet. App. 13-14. Moreno, Mejia, and other witnesses testified to the facts described above. *Id.* at 3, 14. Throughout the trial, petitioner maintained that Moreno was the animating force behind the kickback scheme. For example, in his opening statement, petitioner's counsel stated that Moreno was a "cancer" on society who had "corrupted a great number of Baltimore City police officers," but "did not corrupt my client, Samuel Ocasio." J.A. 70; see J.A. 71 ("So what Moreno was doing, he was corrupting police officers. He was cheating insurance companies. Quite honestly, he is making all of our insurance rates go up."). Similarly, during cross-examination, petitioner asked Moreno: "You in fact recruited most of the officers, did you not?" J.A. 127. And in closing, petitioner argued that "Moreno, and to a lesser extent, his

brother, Edwin Mejia, were clearly involved in this conspiracy up to their ears to get policemen to refer cars to them." C.A. App. 1226; see *id.* at 1232 (arguing that Moreno was "the ultimate schemer" who "cheat[s] everybody that comes into his path").

At the conclusion of the government's evidence and again at the close of all the evidence, petitioner moved for a judgment of acquittal, arguing that he could not be convicted because "the proceeds from the conspiracy were extracted from" the shop's owners, who were co-conspirators. J.A. 176; see J.A. 190. The district court denied the motions because (1) the Fourth Circuit had already rejected the argument that the property in a Hobbs Act conspiracy must come from someone outside the conspiracy; and (2) Majestic, not its owners, "was actually the source of the payment[s]" in this case. J.A. 179; see J.A. 190.

Over petitioner's objection, the district court also declined to instruct the jury that the government had to prove "that the conspiracy was to obtain money or property from some person who was not a member of the conspiracy." J.A. 53; see Pet. App. 30-31. As part of its conspiracy instruction, however, the court "caution[ed]" the jury "that mere knowledge or acquiescence, without participation in the unlawful plan, [was] not sufficient" to "establish membership in the conspiracy." J.A. 195. Rather, the government was required to show that the conspirators had "a mutual understanding * * * to cooperate with each other to accomplish an unlawful act" (J.A. 192) and that the defendant had joined the conspiracy "with the intention of aiding in the accomplishment of those unlawful ends" (J.A. 195).

Officer Manrich pleaded guilty before the case was submitted to the jury. Pet. App. 15. The jury found petitioner guilty on the conspiracy count and all three substantive counts, and the district court sentenced him to 18 months of imprisonment. *Id.* at 47-48. Petitioner was also ordered to pay $3,370.58 in restitution. *Id.* at 15-16; C.A. App. 1472.

3. The court of appeals affirmed petitioner's convictions.[3] Pet. App. 1-29.

On appeal, petitioner did not contest that the trial evidence was sufficient to prove that he had committed extortion in violation of the Hobbs Act. He argued that he could not be convicted of conspiracy, however, because in his view "conspiring to extort property from one's own coconspirator does not contravene federal law." Pet. App. 16. For that argument, petitioner relied on the Sixth Circuit's decision in *United States* v. *Brock*, 501 F.3d 762 (2007), which held that "[t]o be covered by the [Hobbs Act], the alleged conspirators * * * must have formed an agreement to obtain 'property from *another*,' which is to say, formed an agreement to obtain property from someone outside the conspiracy." *Id.* at 767.

The court of appeals rejected petitioner's argument, holding "that a person * * * who actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme[] can be named and prosecuted as a coconspirator even though he is also a purported victim of the conspiratorial agreement."

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[3] As noted (p. 2, *supra*), the court of appeals partially vacated the district court's award of restitution and remanded for further proceedings concerning restitution. Pet. App. 25-29. On remand, the district court amended the judgment and ordered total restitution of $1500 rather than $3,370.58. *Id.* at 53-54.

Pet. App. 22. "That rule," the court observed, "comports with basic conspiracy principles," inasmuch as "[o]ne who knowingly participates in a conspiracy to violate federal law can be held accountable for not only his actions, but also the actions of his coconspirators." *Ibid.*

The court of appeals disagreed with petitioner's argument that "the Hobbs Act's 'from another' language requires that a coconspirator obtain property from someone outside the conspiracy." Pet. App. 23 (citation and internal quotation marks omitted). The court explained that "'from another'" simply "refers to a person or entity other than the public official" who received the property. *Ibid.* In the court's view, "'another' can also be a coconspirator of the public official," provided that the co-conspirator "actively participates" in the conspiracy "rather than merely acquiesc[ing]" in it. *Id.* at 22-23. That is because, the court explained, a bribe-payor's "mere acquiescence" in a payment, without more, would fall short of the "agreement [necessary] to enter into a conspiracy." *Id.* at 23-24. Accordingly, the court reasoned, petitioner was "wrong to suggest that every extortion scheme will necessarily involve a conspiracy to commit extortion." *Id.* at 24.

Finally, the court of appeals also pointed out that petitioner's argument rested on a "flawed * * * evidentiary premise," inasmuch as Moreno and Mejia were not "his only coconspirators." Pet. App. 25 n.14. The evidence at trial "established a wide-ranging conspiracy involving dozens of BPD officers who received money for referring wrecked vehicles to the Majestic Repair Shop." *Ibid.* In the court's view, "the jury was entitled to find" that petitioner had con-

spired with those other officers—irrespective of Moreno's and Mejia's active involvement in the scheme. *Ibid.*

SUMMARY OF ARGUMENT

Petitioner was validly convicted of conspiring to violate the Hobbs Act by joining and participating in a scheme to obtain "property from another, with his consent * * * under color of official right." 18 U.S.C. 1951(b)(2). He argues that conspirators must agree to obtain property from someone outside the conspiracy, but that contention is at odds with the Act itself and with longstanding principles of conspiracy law.

A. Petitioner, a police officer, formed and carried out an agreement to commit Hobbs Act extortion. He agreed with the owners of a body shop, and with other police officers, that the officers would "obtain[] a payment to which [they were] not entitled, knowing that the payment was made in return for official acts," *Evans* v. *United States*, 504 U.S. 255, 268 (1992), namely, referrals of wrecked vehicles to the shop. All participants, including the shop's owners, actively participated in that scheme.

B. Petitioner's primary textual argument against conspiracy liability rests on the requirement that property be obtained "from another." Petitioner asserts that when conspirators merely agree "to exchange property between themselves," then "[t]heir agreement does not concern 'another' at all—only themselves." Pet. Br. 22. That argument is premised on the mistaken assumption that all conspirators must agree to commit every element of the crime. But "a conspirator [need] not agree to commit or facilitate each and every part of the substantive offense." *Salinas* v. *United States*, 522 U.S. 52, 63 (1997).

Indeed, a conspirator may face liability "even though he was incapable of committing the substantive offense" himself. *Id.* at 64. Although the shop's owners did not agree that *they* would obtain property "from another," all participants in the kickback scheme agreed on a common goal: that police officers would perform official acts in order to obtain property from another. Petitioner's other textual arguments rely on the same mistaken premise.

Petitioner's interpretation would also perversely punish the government for alleging and proving additional facts at trial, as this case illustrates. Had petitioner been accused of conspiring *solely* with fellow officers, even petitioner would concede that all elements of the conspiracy would be satisfied. But because the government accused him of conspiring "with other Baltimore Police Department Officers * * * , *and with Moreno and Mejia*," petitioner says the prosecution was defective. J.A. 36 (emphasis added). There is no reason that a narrower conspiracy involving fewer participants should receive criminal punishment, while a broader one involving more participants receives none.

Petitioner's reading is further flawed, because it would cause serious conceptual problems in cases involving payments from artificial entities, such as businesses, that can act only through their agents. And it would have anomalous consequences for conspiracy charges based on other federal criminal statutes that prohibit transfers "from another" or "to another"—many of which often involve collusive action between the transferee and transferor.

C. Petitioner's purpose-based arguments are equally unpersuasive. First, he asserts that the gov-

ernment's reading of the Hobbs Act "turns every act of receiving a bribe into a conspiracy to commit extortion." Pet. Br. 37 (capitalization altered). He reasons that, because the Act requires property to be obtained with "consent," 18 U.S.C. 1951(b)(2), that same consent will also "establish that the bribe-payor and the public official *agreed*" to the transaction. Pet. Br. 37. But the Act's "consent" requirement sets a far lower threshold than the *mens rea* necessary for conspiracy; "consent" may be shown even when a conspiratorial agreement does not exist.

Petitioner is also wrong in suggesting that the Fourth Circuit "fabricated" a distinction between a bribe-payor's "mere acquiescence" to an official demand, as opposed to his "active participation" in the scheme. Pet. Br. 46. That distinction is drawn directly from this Court's conspiracy case law. See *United States* v. *Holte*, 236 U.S. 140 (1915); *Gebardi* v. *United States*, 287 U.S. 112 (1932). In the years since *Gebardi*, numerous courts have applied the mere acquiescence/active participant distinction to Hobbs Act extortion, with no hint of difficulty or unfairness.

Finally, the government's approach would not impose liability on extortion "victims." Pet. Br. 17, 18, 23. When a public official commits extortion by trading official acts for private gain, the true victim is the public, because "extortion is an abuse of public justice." 4 William Blackstone, *Commentaries on the Laws of England* 141 (1769) (emphasis omitted). To call Moreno and Mejia "the victims of their own conspiracy" (Pet. Br. 2) ignores their active and moving role in instigating the scheme and ensuring its success.

D. Even if petitioner were correct that a Hobbs Act conspiracy must involve conspirators other than the bribe-payor, such a conspiracy existed in this case. The indictment alleged, and the evidence at trial proved, that petitioner conspired with his fellow police officers. Any error in instructing the jury that the shop owners were co-conspirators as well was accordingly harmless.

ARGUMENT

A PUBLIC OFFICIAL WHO AGREES TO OBTAIN PROPERTY FROM A CO-CONSPIRATOR IN EXCHANGE FOR PUBLIC ACTS MAY BE PROSECUTED FOR CONSPIRACY TO COMMIT EXTORTION

The general federal conspiracy statute makes it an offense when "two or more persons conspire * * * to commit any offense against the United States" and one of the conspirators commits an overt act in furtherance of the offense. 18 U.S.C. 371. When the conspiracy is to violate the Hobbs Act through extortion by a public official, the conspirators must agree that the official will "obtain[] a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans* v. *United States*, 504 U.S. 255, 268 (1992). That is what occurred in this case: The conspirators agreed that petitioner and other BPD officers would use their authority to funnel car accident victims to Majestic, in return for payments from the shop's owners.

Petitioner contends that, because the alleged conspirators must conspire to obtain "property *from another*, with his consent," 18 U.S.C. 1951(b)(2) (emphasis added), the conspirators must agree to obtain property from someone outside the conspiracy. But not every conspirator must agree to commit (or

must be capable of committing) every element of the substantive crime. The conspirators need only agree that *the public official* will obtain property from another, with the other's consent, and that the provider of the property will actively participate in the scheme. Petitioner and his co-conspirators satisfied those requirements by jointly forming a plan in which petitioner would sell "public favors for private gain." *Wilkie* v. *Robbins*, 551 U.S. 537, 564 (2007). And even under petitioner's own theory, the evidence clearly established his liability.

A. Conspiracy To Violate The Hobbs Act Requires Only An Agreement For That Unlawful Purpose And An Overt Act In Furtherance Of The Agreement

"The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942). When two or more people join forces to obtain an objective that the law forbids, and "one or more of [them] do any act to effect the object of the conspiracy," then they may be found in violation of the general federal conspiracy statute. 18 U.S.C. 371. Together with the shop's owners and with other BPD officers, petitioner formed an agreement whose objective was for petitioner and other officers to commit "extortion" under the Hobbs Act—that is, for the officers to exchange official acts for money. Having formed and carried out that agreement, petitioner was guilty of criminal conspiracy.

1. "A conspiracy is a partnership in criminal purposes." *United States* v. *Kissel*, 218 U.S. 601, 608 (1910). Congress long ago recognized that "collective criminal agreement * * * presents a greater potential

threat to the public than individual delicts." *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). Among other things, a conspiracy serves "to unite, back of a criminal purpose, the strength, opportunities and resources of many," creating a multifarious organization that is "obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer." *Krulewitch* v. *United States*, 336 U.S. 440, 448-449 (1949) (Jackson, J., concurring). Joint activity allows for a division of labor among conspirators, "mak[ing] possible the attainment of ends more complex than those which one criminal could accomplish." *Callanan*, 364 U.S. at 593. And the creation of an ongoing criminal enterprise also "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Id.* at 594. For these and other reasons, "[i]t has been long and consistently recognized * * * that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton* v. *United States*, 328 U.S. 640, 643 (1946).

Under the general federal conspiracy statute, "two or more persons [who] conspire * * * to commit any offense against the United States" are guilty of conspiracy if any one of them "do[es] any act to effect the object of the conspiracy." 18 U.S.C. 371. The statute thus has two elements: (1) an agreement between two or more conspirators "to commit any offense against the United States"; and (2) an overt act by one of them "to effect the object" of that agreement. The first element resembles forming an agency relationship: It is an "'agreement[] to agree' on the multitude of decisions and acts necessary to successfully pull off a crime." *United States* v. *Townsend*, 924 F.2d 1385,

1394 (7th Cir. 1991). Accordingly, although the conspirators must "pursue the same criminal objective," a conspirator need not agree that he, himself, will "commit or facilitate each and every part of the substantive offense." *Salinas* v. *United States*, 522 U.S. 52, 63 (1997). Rather, it is sufficient that all members of the conspiracy have committed themselves towards the same unlawful goal. See *id.* at 64 ("If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.").

2. The Hobbs Act prescribes criminal punishment for "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. 1951(b)(2). As this Court has explained, the statute thus combines two categories of criminal conduct—"coercive extortion and extortion by official right"—that had been treated as separate offenses under New York penal law and the 19th-century Field Code, which were Congress's two models in adopting the Hobbs Act. *Evans*, 504 U.S. at 261 n.9.

At issue in this case is extortion by official right, traditionally a common law offense "committed by a public official who took 'by colour of his office' money that was not due to him for the performance of his official duties." *Evans*, 504 U.S. at 260 (citation and footnotes omitted). As incorporated by the Hobbs Act, extortion by official right covers at least two

categories of wrongdoing by public officials. The first category is "extortion accomplished by fraud," for instance where an official falsely claims entitlement to a fee for his services. *Id.* at 269; see *ibid.* ("wrongful takings under a false pretense of official right"). The second category, which was at issue in *Evans* itself, is "the rough equivalent of what we would now describe as 'taking a bribe.'" *Id.* at 260. A public official commits this form of extortion if he "has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268. Although the payment must be accepted by the public official "in return for his agreement to perform specific official acts," *ibid.*, the exchange need not be "*initiated* by the recipient of the bribe," *id.* at 266. See *ibid.* (government need not "pro[ve] that the inducement took the form of a threat or demand").

3. Petitioner does not deny that he was validly convicted of substantive acts of extortion. See Pet. Br. 1 ("Under this Court's precedent, petitioner's conduct constitutes extortion."). Nor could he. The evidence at trial overwhelmingly showed that petitioner accepted multiple payments from the body shop's owners in return for using his influence as a police officer to funnel car accident victims to their shop. That was public-official extortion as the Act defines it: Petitioner "obtain[ed] * * * property from another, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2).

As noted above, for petitioner also to be guilty of conspiracy, the government was required to prove (1) that he agreed with one or more persons "to commit any offense against the United States"; and (2) one of the conspirators took an overt act "to effect

the object" of their agreement. 18 U.S.C. 371. The evidence established that distinct offense as well.

The first element was satisfied by the conspirators' agreement to "pursue the same criminal objective." *Salinas*, 522 U.S. at 63. Petitioner agreed "with other Baltimore Police Department Officers * * * and with Moreno and Mejia" that Majestic would "issu[e] payments to the BPD Officers in exchange for the BPD Officers' exercise of their official positions and influence." J.A. 36 (superseding indictment). The body shop's owners closely aligned themselves with petitioner and other participating officers in active pursuit of that common goal. The conspirators thus agreed that petitioner and other officers would "commit an[] offense against the United States."

That criminal agreement, moreover, had precisely the characteristics that make conspiracies so dangerous. It united the "opportunities and resources" of BPD officers such as petitioner—namely, the officers' access to and influence over car accident victims —together with the business assets and know-how of the shop's owners. See *Krulewitch*, 336 U.S. at 448 (Jackson, J., concurring). Participating BPD officers also used their access *to other officers* in order to recruit new co-conspirators, thereby extending the conspiracy's reach. This division of labor enabled a far broader and "more complex" scheme than any conspirator could have pulled off on his own. See *Callanan*, 364 U.S. at 593. The conspiracy also facilitated crimes other than the kickbacks themselves, such as falsified accident reports, phony towing forms, self-inflicted damage to vehicles, and other forms of insurance fraud. See *id.* at 594.

The second element of conspiracy—an overt act—is not seriously disputed. Petitioner took a number of steps "to effect the object" of the conspiracy, as did Moreno, Mejia, and other participating officers. Having satisfied both elements of Section 371, petitioner may be held liable for conspiracy.

B. Petitioner's Textual Argument Is Premised On A Mistaken Assumption: That All Conspirators Must Satisfy Each Element Of The Substantive Offense

Petitioner does not directly address the elements of a Section 371 conspiracy. Indeed, petitioner does not refer at all to the text of the statute under which he was convicted. See Pet. Br. viii-ix (listing federal statutes, but not Section 371). Instead, petitioner focuses on the requirement for an extortion conviction under Section 1951 that property be taken "from another." He argues that members of a conspiracy cannot satisfy that requirement if the property is taken from one of them. According to petitioner, the government must therefore prove that the conspirators "agreed among themselves to obtain property from a person *outside* the conspiracy." *Id.* at 21 (emphasis added). But that argument cannot be squared with well-established principles of conspiracy liability, or with the statute itself.

1. Petitioner's primary argument purports to follow from the Hobbs Act's text. The statute punishes "[w]hoever" commits "extortion or attempts or conspires so to do." 18 U.S.C. 1951(a). The Act further defines extortion as "the obtaining of property *from another*, with his consent, * * * under color of official right." 18 U.S.C. 1951(b)(2) (emphasis added). The word "another" must refer to someone besides the perpetrator of the crime. Pet. Br. 22. So if two or

more people conspire "to exchange property between themselves," petitioner concludes, then "[t]heir agreement does not concern 'another' at all—only themselves." *Ibid.*

Petitioner misreads the statute. When a public official faces prosecution for conspiracy to commit extortion under Section 1951(a), "Whoever" refers to the defendant official, and "property from another" refers to property not belonging to that official. See *Merriam-Webster's Collegiate Dictionary* 48 (10th ed. 1993) (defining "another" to mean, *inter alia*, "different or distinct from the one first considered"). The phrase "with his consent" similarly refers to the consent of someone other than the public official. Those conditions were satisfied here: Petitioner obtained property from another (Moreno and Mejia), and did so "with his consent." Petitioner therefore obstructed commerce "by extortion"; and, in forming an agreement for that purpose, he also "conspire[d] so to do."

Petitioner's error lies in his unstated—but repeated—assumption that *no* conspirator may face liability unless *all* conspirators have agreed to commit every element of the crime. This error is well illustrated by an example petitioner offers:

> John, a policeman, says to Susan, a civilian, "*Let us agree to obtain money from another*, by getting that person's consent through use of my right and authority as a public official." Susan then asks, "Who did you have in mind?" If John were to answer, "Oh, I meant *you* should pay me," Susan would rightly be confused.

Pet. Br. 23 (first emphasis added). In this example, John's phrasing suggests that both he and Susan ("us") are the subject of all the conduct: not only the

"agree[ing]," but also the "obtain[ing]." But while both Susan and John can agree, only John can obtain money from another. In other words, what makes the phrasing problematic is that it requires both participants to take both actions—or at least to be capable of doing so.

Under long-established principles of conspiracy liability, however, "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." *Salinas*, 522 U.S. at 63. Indeed, a conspirator can be held liable even if he, himself, has agreed to commit *none* of the elements of the substantive offense. For instance, if the "plan * * * calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators." *Id.* at 64. Moreover, "[a] person * * * may be liable for conspiracy even though he was incapable of committing the substantive offense" himself. *Ibid.* All that is required is that the conspirators "share a common purpose" that a crime be committed. *Ibid.*

This last principle—that not all conspirators must be capable of committing the substantive offense—is illustrated by *United States* v. *Holte*, 236 U.S. 140 (1915). That case involved a prosecution for conspiracy to violate the Mann Act, ch. 395, 36 Stat. 825, which imposed liability on "any person who shall knowingly transport * * * in interstate or foreign commerce * * * any woman or girl for the purpose of prostitution or debauchery." The question was whether "the transported woman" could be guilty of conspiring to violate the Act based on the general federal conspiracy statute—that is, whether she had "'conspire[d] to commit an offence against the United States.'" *Holte*,

236 U.S. at 144 (quoting predecessor of Section 371). The defendant argued that conspiracy liability could only be predicated on "an offence that all the conspirators should commit," and that, as the woman who was transported, she could not be guilty of the substantive offense. *Ibid.* The Court disagreed, explaining that under "the common law as to conspiracy," the word "'commit' means no more than bring about." *Ibid.* Given that definition, "plainly a person may conspire for the commission of a crime by a third person," even if she could not commit the crime herself. *Ibid.*; see *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915) ("A person may be guilty of conspiring although incapable of committing the objective offense.").

In this case, although the shop's owners could not themselves commit public-official extortion, they nevertheless could "conspire for the commission of a crime by a third person"—namely, by petitioner and other BPD officers. To return to petitioner's example, John might have said: "Let us agree *that I, a public official*, will obtain money from another, namely you, by getting your consent through use of my right and authority as a public official." The conspirators in that scenario can agree to the use of the public official's authority in exchange for private gain; and if the private party actively participates in the corrupt scheme, see pp. 33-39, *infra*, then the two are conspirators.

2. Petitioner's other textual arguments are similarly unavailing.

a. Petitioner contends that "when a public official and a citizen merely agree to *exchange* property between themselves, it cannot be said that both parties

are agreeing to *obtain* the property." Pet. Br. 23. But their conspiratorial agreement need not be that "both parties" will obtain the property. Rather, they need only agree that "a public official [will] obtain[] a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans*, 504 U.S. at 268.

b. For the same reason, petitioner errs in suggesting that the government's interpretation would have the conspirators agreeing "to obtain *their own* consent" to the payment. Pet. Br. 24 (emphasis added). The consent of all conspirators is not required, only the consent of the person giving money to the public official.

c. Petitioner argues that the Hobbs Act "punishes 'whoever' conspires to obtain property from 'another,'" thereby indicating "that the 'whoever' and the 'another' must be *different* people." Pet. Br. 24. That argument depends on cobbling together the conspiracy language of Section 1951(a) ("Whoever" interferes with commerce by "extortion or attempts or conspires so to do") with the definition of extortion in Section 1951(b)(2) ("obtaining of property from another"). But petitioner was not convicted of conspiracy under Section 1951(a). Rather, he was convicted under Section 371, which applies when "two or more persons conspire * * * to commit any offense against the United States." Petitioner does not dispute that he committed such an offense, or that he formed an agreement in service of that goal. That is all a conviction under Section 371 requires. See pp. 15-20, *supra*.

Even if petitioner had been convicted of conspiracy under Section 1951, that would not save his argument. Petitioner is correct that the person who "obtain[s]"

the property must be different than "another," but that does not mean that the person who obtains the property must be the same as "Whoever" is prosecuted for conspiracy. Indeed, if petitioner were correct that "Whoever" conspires must also be the person who "obtain[s]" the property, then *only* public officials could be conspirators, because only public officials can obtain property "under color of official right." Yet the statute gives no indication that private parties who actively facilitate an extortionate scheme are immune from conspiracy liability. To the contrary, petitioner himself cites New York cases in which private parties were held liable for conspiring with public officials. See Pet. Br. 41 (citing *People* v. *Kay*, 105 N.Y.S.2d 687, 688 (N.Y. App. Div. 1951) (per curiam), in which "police officers conspired with two civilians," and *In re Stephens*, 203 N.Y.S. 500, 504-505 (N.Y. App. Div. 1924), in which a private attorney conspired with a district attorney). In cases like those, where a private party conspires with a public official, the private party can be the "Whoever" in Section 1951(a), even if the "obtaining of property from another * * * under color of official right" in Subsection 1951(b)(2) was done by the official.[4]

d. Finally, petitioner argues that "the government's interpretation erases the requirement of obtaining property 'from another,'" because "no statutory language is needed to confirm the metaphysical impossibility of paying oneself a bribe with one's own

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[4] Petitioner's argument overlooks the fact that "Whoever" in Section 1951(a) is not the subject of "obtaining of property" in Section 1951(b)(2). Instead, "Whoever" refers to a person who "obstructs, delays, or affects commerce" or a person who "attempts or conspires so to do." 18 U.S.C. 1951(a).

money." Pet. Br. 29. But all sides agree that the property must change hands; the only question is whether it may go from a co-conspirator to a public official (the government's view), or must it go to the official from someone uninvolved in the conspiracy (petitioner's view). The answer to that question has nothing to do with "the metaphysical impossibility of paying oneself a bribe." And in any event, under either interpretation, the word "obtaining" would itself be sufficient to indicate movement from one person to another: "Obtaining property requires 'not only the deprivation but also the acquisition of property.'" *Sekhar* v. *United States*, 133 S. Ct. 2720, 2725 (2013) (quoting *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 404 (2003)).

3. Petitioner's interpretation of Section 1951 would also produce at least three anomalies that Congress likely did not intend. See *Sullivan* v. *Hudson*, 490 U.S. 877, 890 (1989) ("Congress cannot lightly be assumed to have intended" a reading that produces "anomalous" results.).

a. Petitioner does not dispute that, for purposes of his substantive extortion convictions, the statutorily required roles were satisfied: Petitioner was the "Whoever" in Section 1951(a), and Moreno was "another" in Section 1951(b) from whom property was obtained "with his consent." Yet under petitioner's reading, those same respective roles do not suffice for purposes of a conspiracy conviction. Congress would have had no reason to bar conspiracy liability when the bribe-payor actively participates with the corrupt official in the undisputed selling of his office.

Petitioner responds that a bribe-payor like Moreno cannot simultaneously "occupy both roles"—that is,

cannot be both "a conspirator and the 'another' from whom the conspirators wrongly obtain property." Pet. Br. 30. But that response simply begs the question presented (*i.e.*, whether "property from another" may come from a participant in the conspiracy). Rather than *explaining* the anomaly that his view would create, petitioner simply reasserts that his view is correct.

b. In addition, petitioner's interpretation would perversely penalize the government for alleging and proving additional facts at trial. Under petitioner's reading, a public official who agrees with other officials to receive a bribe from a private citizen would be guilty of conspiracy. But if those same officials *also* conspire with the bribe-payor, then *no one* is guilty of conspiracy.

This case illustrates the point. If petitioner had conspired *solely* with his fellow BPD officers, then he would not dispute that all elements at issue—including "property from another" and "with his consent"—would be satisfied. But because the evidence established that petitioner conspired "with other Baltimore Police Department Officers * * * , *and with Moreno and Mejia*," petitioner says that his conviction was defective. J.A. 36 (emphasis added). Under petitioner's interpretation, the government would have been better off charging and proving a narrower conspiracy involving fewer participants. There is no reason that a narrower conspiracy involving fewer participants should receive criminal punishment, while a broader one involving more participants receives none.

c. Petitioner's theory would also create serious conceptual problems in cases involving payments

drawn from artificial entities, such as businesses or unions, that can act only through their agents. It may be difficult in such cases to determine whose property was "obtain[ed]" and with whose "consent." See, *e.g.*, *United States* v. *Spitler*, 800 F.2d 1267, 1269-1270 (4th Cir. 1986) (corporation's vice president authorized gifts to public official purchased with company funds, in return for official's promise to approve company's fraudulent invoices). It is also unclear whether the answer might depend on the particular entity's form—for instance, whether or not it is incorporated, or whether it is owned or controlled by the bribe-payor—even though those formalities have little to do with culpability.[5]

4. Finally, petitioner's reading would also create a substantial loophole in conspiracy law, because many federal criminal statutes use phrases like "from another" or "to another." For instance, a prohibition on passing state secrets applies to a federal employee who "obtains from another" any coded information and who, without authorization, "willfully publishes or furnishes to another" that information. 18 U.S.C. 952. Imagine a State Department employee who forms an illicit agreement to acquire coded information from a Ukrainian spy and sell it to his contact in the Russian government. Under petitioner's interpretation, *none* of the three participants in that scenario would face

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[5] In this case, for example, Majestic was initially a limited liability company but became a corporation while the kickback scheme was in progress, C.A. App. 655-656, 736; J.A. 145, and the record does not indicate who owned its stock. There is no reason to think that Congress would have wanted petitioner's criminal liability to turn on the particular corporate form of the entity from which his bribes were paid.

conspiracy liability: The conspirators would be incapable of "obtain[ing] from another" or "furnish[ing] to another."

Petitioner's theory would create the same gap in several other criminal prohibitions. See, *e.g.*, 18 U.S.C. 495 (forging contracts "for the purpose of * * * enabling *any other person*" to receive money from the United States) (emphasis added); 18 U.S.C. 500 (issuing a fake money order to "fraudulently enabl[e] *any other person*" to obtain money from the postal service) (emphasis added); 18 U.S.C. 1543 (forged passport that is "furnishe[d] *to another* for use") (emphasis added). Yet such crimes are frequently committed through collusion. For instance, in *United States* v. *Zayyad*, 741 F.3d 452 (4th Cir. 2014), the defendant was convicted under Section 371 for conspiring with a drug dealer to traffic in counterfeit goods, in violation of 18 U.S.C. 2320, by supplying the dealer with fake Viagra and Cialis. 741 F.3d at 456-458. Since "the term 'traffic' means to transport, transfer, or otherwise dispose of, *to another*," 18 U.S.C. 2320(f)(5) (emphasis added), petitioner's theory would have precluded conspiracy liability.

C. Petitioner's Other Arguments For Limiting Conspiracy Liability Are Unpersuasive

Petitioner's non-textual arguments are based on the premise that the government's reading of the Hobbs Act "would turn every payment of a bribe to a public official into a conspiracy to commit extortion." Pet. Br. 18. That premise misunderstands the Act's consent requirement and runs counter to longstanding principles of conspiracy law.

1. Obtaining property with another's "consent" is not equivalent to forming a conspiratorial agreement

Petitioner argues that the government's reading of the Hobbs Act "turns every act of receiving a bribe into a conspiracy to commit extortion." Pet. Br. 37 (capitalization altered). He begins by noting that the Act requires property to be given with the bribe-payor's "consent." 18 U.S.C. 1951(b)(2). According to petitioner, that same consent will also "establish that the bribe-payor and the public official *agreed*" to the transaction, automatically making the bribe-payor a co-conspirator to the extortion. Pet. Br. 37. As a consequence, he concludes, the Hobbs Act would become a "broad prohibition on *paying* bribes," *id.* at 31, contrary to Congress's choice elsewhere in the criminal code to attack bribery with precision, *id.* at 33-34 (citing 18 U.S.C. 201(b)(1), 210, 212(a), 226(a)(1), 666). But petitioner errs in conflating the Act's "consent" requirement with the *mens rea* necessary to form a conspiracy, which is a much higher threshold.

At common law, robbery was the obtaining of property by the application of pressure "such as may overcome the ordinary free will of a firm man." James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. Rev. 815, 881 (1988) (Lindgren) (quoting *King* v. *Southerton*, 102 Eng. Rep. 1235, 1241 (1805)). In both the Field Code and New York penal law, the taking from another was said to be accomplished "against his will." Commissioners of the Code, *The Penal Code of the State of New York* § 280, at 98 (1865) (*Field Code*); see N.Y. Penal Law § 224, at 68 (1881) (same). This was a stringent standard: "[T]he physical power to resist [must be] overcome by

force, or what is equivalent in law, the moral power to refuse [must be] prostrated by fear." *Field Code* § 584 note, at 210.

Instances involving a lesser degree of coercion, by contrast, qualified as extortion, in which the taking was said to occur "with his consent." *Field Code* § 613, at 220; see N.Y. Penal Law § 552, at 174 (1881) (same). The difference between the two crimes was understood to be one of degree. See *Field Code* § 584 note, at 211 ("Thus extortion partakes in an inferior degree of the nature of robbery."). The Hobbs Act preserved the traditional distinction, with "th[e] element of consent" continuing to serve as "the razor's edge that distinguishes extortion from robbery." *United States* v. *Zhou*, 428 F.3d 361, 371 (2d Cir. 2005); see *United States* v. *Coppola*, 671 F.3d 220, 240 (2d Cir. 2012) ("[T]he consent element serves * * * to distinguish between two illegal means of so obtaining property: extortion (with consent) and robbery (without consent)."), cert. denied, 133 S. Ct. 843 (2013).

As used by the Hobbs Act, therefore, consent simply indicates the taking of property under circumstances falling short of robbery. But the presence of consent does not necessarily indicate a mutual "agreement" between co-conspirators, which is "the essential element of the crime" of conspiracy. *Iannelli* v. *United States*, 420 U.S. 770, 777 n.10 (1975). That much is made clear by the Act itself, which includes coercive extortion, in which payment is made "with [another's] consent, induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. 1951(b)(2). No one would say that such a payment signals the "collective criminal agreement" necessary for a conspiracy. *Callanan*, 364 U.S. at 593. The

same is true in cases of "extortion accomplished by fraud," where property is taken "under a false pretense of official right." *Evans*, 504 U.S. at 269. Yet clearly both types of extortion—coercive extortion and extortion by fraud—may still occur "with consent" from another. Petitioner is thus wrong to suggest that, in every case of extortion, the participants will automatically satisfy the *mens rea* for conspiracy.[6]

For the same reason, petitioner is also wrong that, under the government's approach, every bribe-payor would be a co-conspirator. Consent is not equivalent to conspiratorial agreement; that the payor gave his "consent" means only that property changed hands under conditions not amounting to robbery. In cases where the payor is simply complying with an official demand, for instance, no meeting of the minds would occur. See *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) ("The essence of conspiracy is 'the combination of minds in an unlawful purpose.'") (quoting *United States* v. *Hirsch*, 100 U.S. 33, 34 (1879)). But where the participants have "combined efforts * * * in pursuance of [a] plan," a genuine "partnership in crim-

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[6] Petitioner also alludes to the rule that a defendant may not be convicted of both the substantive crime and conspiracy "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime." Pet. Br. 38 (quoting *Pinkerton*, 328 U.S. at 643). But that rule, often referred to as Wharton's Rule, "applies only to offenses that *require* concerted criminal activity," *Iannelli*, 420 U.S. at 785, which Hobbs Act extortion does not. The circumstances of this case would also fall under the so-called third-party exception to Wharton's Rule, because "the conspiracy involves more persons than are required for commission of the substantive offense." *Id.* at 782 n.15.

inal purposes" would exist, *Kissel*, 218 U.S. at 608, and they may be prosecuted for conspiracy.

2. An "active participation" requirement is consistent with conspiracy principles

In accordance with the foregoing, the Fourth Circuit correctly recognized that "'mere acquiescence'" to an official demand "is not punishable under conspiracy principles." Pet. App. 20. Where a bribe-payor "actively participates (rather than merely acquiesces) in a conspiratorial extortion scheme," by contrast, he may face liability as a conspirator. *Id.* at 22. Petitioner mischaracterizes this distinction as "fabricated." Pet. Br. 46. In fact, not only is the distinction essential to the formation of a conspiracy, it has deep roots in this Court's conspiracy case law.

The Court first alluded to such a distinction in *Holte*, *supra*, where the question was whether a woman transported in violation of the Mann Act could conspire with the man with whom she traveled between states. The trial court dismissed the indictment against her, reasoning that "she was no party to [the offense] but only the victim." 236 U.S. at 144. This Court disagreed. While acknowledging that "there may be a degree of cooperation that would not amount to a crime," the Court declined to rule out in all cases a conspiracy involving the woman being transported. *Id.* at 144-145. For instance, if the woman "should suggest and carry out [the] journey," and if she "should buy the railroad tickets, or should pay the fare" for the trip, then a conspiracy might exist. *Id.* at 145. The Court therefore found "little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim." *Ibid.*

The Court elaborated on this theme in *Gebardi* v. *United States*, 287 U.S. 112 (1932), another prosecution for conspiracy to violate the Mann Act. There, the Court stressed features of the statute that are pertinent here as well:

> Congress set out in the Mann Act to deal with cases which frequently, if not normally, involve consent and agreement on the part of the woman to the forbidden transportation. In every case in which she is not intimidated or forced into the transportation, the statute necessarily contemplates her acquiescence. Yet this acquiescence, though an incident of a type of transportation specifically dealt with by the statute, was not made a crime under the Mann Act itself.
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> * * * * *
>
> [W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished.

Id. at 121, 123. In other words, where Congress has chosen to criminalize only one half of a transaction that typically involves consent or acquiescence, then conspiracy liability should presumptively require a higher level of coordinated activity. See *id.* at 119 ("In applying this criminal statute we cannot infer that the mere acquiescence of the woman transported was intended to be condemned by the general language punishing those who aid and assist the transporter.").

The *Gebardi* Court accordingly held that a conspiracy could exist, but only if the woman's role in the crime was "more active than mere agreement on her

part" to the illegal transportation. 287 U.S. at 119. Applying that test, it determined that the conspiracy convictions at issue could not stand. The woman had merely "consented" to her transportation across state lines, the Court explained, but there was "no evidence that she purchased the railroad tickets or that hers was the active or moving spirit in conceiving or carrying out the transportation." *Id.* at 116-117.

The reasoning of *Gebardi* applies with full force to Hobbs Act extortion, which shares two key features with the Mann Act. First, the Hobbs Act penalizes one half of a bilateral transaction—as petitioner himself points out. See Pet. Br. 25-26, 32-34. Second, at least in cases of public-official bribery, "the statute necessarily contemplates [the] acquiescence" of the bribe-payor. *Gebardi*, 287 U.S. at 121. In reliance on these features, courts have construed the Hobbs Act to permit liability for a bribe-payor whose conduct was "more active than mere acquiescence" to an extortionate demand. *Spitler*, 800 F.2d at 1276. In *Spitler*, for instance, the Fourth Circuit upheld a bribe-payor's conviction for aiding and abetting extortion because he had "created a symbiotic relationship with [the public official] through which [he] and [his employer], in exchange for subsequent payments to [the official], would receive substantial financial benefits from [the official's] approval of [the employer's] false invoices." *Id.* at 1278. And in this case, the Fourth Circuit applied the same reasoning to extortionate conspiracies. Pet. App. 22-25.[7]

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[7] The jury instructions in this case "caution[ed] * * * that mere knowledge or acquiescence, without participation in the unlawful plan, [was] not sufficient" to "establish membership in the conspiracy." J.A. 195.

The Fourth Circuit is not alone in applying *Gebardi* to Hobbs Act extortion. For decades, lower courts have permitted bribe-payors to face aiding-and-abetting liability for actively participating in bribery schemes. See, *e.g.*, *United States* v. *Cornier-Ortiz*, 361 F.3d 29, 40 (1st Cir. 2004) (upholding conviction for aiding and abetting extortion where "[t]he evidence supported the conclusion that some sort of quid pro quo arrangement was in place and that Cornier did more than merely acquiesce to it"); *United States* v. *Wright*, 797 F.2d 245, 252 (5th Cir. 1986) ("[T]he evidence indicates that Wright did aid and abet [the public official's] extortion by actively inducing and soliciting the payment to [the official]."), cert. denied, 481 U.S. 1013 (1987); *United States* v. *Zeuli*, 725 F.2d 813, 817 (1st Cir. 1984) ("We have been directed to no place in the record that supports the contention that Zeuli was a victim of the extortion rather than a perpetrator of it."); *United States* v. *Marchan*, 32 F. Supp. 3d 753, 764 (S.D. Tex. 2013) ("The evidence was clear (and was practically uncontroverted) that [the defendant] was actively and willingly involved in this scheme and that he was not a victim."); *United States* v. *Nelson*, 486 F. Supp. 464, 490 (W.D. Mich. 1980) ("But the defendant in this case is more than just a payor of extorted money. He is an initiator of an extortion."); see also *United States* v. *Johnson*, 337 F.2d 180, 196 (4th Cir. 1964) (upholding conviction for aiding and abetting violation of conflict-of-interest statute where defendants had "a far more active role" than "merely as payers" of a bribe), cert. denied, 379 U.S. 988 (1965), 385 U.S. 846, and 385 U.S. 889 (1966). Where a bribe-payor has merely acquiesced to an official demand, by contrast, he will not be held liable

as an aider and abettor. See *United States* v. *Tillem*, 906 F.2d 814, 824 (2d Cir. 1990) (reversing conviction for aiding and abetting extortion where defendant was "a victim succumbing to a climate of unstated prerequisites to doing business with particular public officials" (citation omitted)).

Thus, the distinction between mere acquiescence and active participation was not "made-up" by the Fourth Circuit, as petitioner claims. Pet. Br. 3. To the contrary, "[f]inding culpability when a 'victim' goes beyond passive compliance and becomes an active participant in a conspiracy has been a principle of our common law from the turn-of-the-century." *Tillem*, 906 F.2d at 822 (citing *Holte*).[8]

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[8] This Court has applied similar reasoning in other contexts. In *Abuelhawa* v. *United States*, 556 U.S. 816 (2009), the Court considered whether the prohibition on using a phone to "facilitate" drug sales applied to a defendant who had merely purchased a small quantity of drugs on his cell phone. *Id.* at 818. The Court read the prohibition on facilitation narrowly (to mean "'aid' and 'abet'") rather than broadly (to mean "make a sale easier") in recognition that the use of phones is a common feature of almost any drug transaction. *Id.* at 820-822 (citing *Gebardi*). Similarly, in *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943), the Court held that a drug manufacturer would not face conspiracy liability for its otherwise legal sale of a prescription drug to a physician merely because the manufacturer knew that the physician intended to resell the drug illegally. *Id.* at 712 & n.8. But if the manufacturer "work[ed] in prolonged cooperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there [would be] no legal obstacle to finding that the supplier *not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible.*" *Id.* at 713 (emphasis added); see *ibid.* (conspiracy liability permitted where "[t]here is informed and interested cooperation, stimulation, instigation").

Petitioner asserts that the distinction is "unworkable and hopelessly vague." Pet. Br. 48. But he points to no evidence that juries or judges have struggled with it in the years since *Gebardi*, or that its application has led to arbitrary or unjust results. "[T]he trier of fact is quite capable of deciding the intent with which words were spoken or action taken as well as the reasonable construction given to them by the official and the payor." *Evans*, 504 U.S. at 274 (Kennedy, J., concurring). And as to vagueness, this Court recently found no reason to "doubt the constitutionality of laws that call for the application of a qualitative standard * * * to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly some matter of degree.'" *Johnson* v. *United States*, No. 13-7120 (June 26, 2015), slip op. 12 (alteration omitted) (quoting *Nash* v. *United States*, 229 U.S. 373, 377 (1913)). Indeed, "[c]lose cases can be imagined under virtually any statute. The problem that poses is addressed, not by the doctrine of vagueness, but by the requirement of proof beyond a reasonable doubt." *United States* v. *Williams*, 553 U.S. 285, 306 (2008).

In enacting the Hobbs Act, Congress chose to criminalize behavior that "obstructs, delays, or affects commerce" by means of extortion. 18 U.S.C. 1951(a). It also recognized that extortionate schemes involving multiple participants can have just as great an impact—if not greater—which is why it imposed liability on anyone who "conspires so to do." *Ibid.* Where a public official initiates extortion on his own, with only the "mere acquiescence" of the bribe-payor, then the official should alone face liability. *Gebardi*, 287 U.S. at 119. But where (as here) a bribe-payor not only

acquiesced, but in fact "was the active or moving spirit in conceiving or carrying out the" scheme, *id.* at 117, there is no reason to doubt that Congress would deem him to be just as culpable as any other conspirator.

3. The government's interpretation would not impose liability on extortion "victims"

Another significant theme running throughout petitioner's brief is that the government seeks to turn bribe-payors like Moreno and Mejia into "the victims of their own conspiracy." Pet. Br. 2. This allegedly shows that the government's interpretation must be flawed: "A party cannot at the same time be both a victim of an extortion conspiracy (the party who parts with his rightful property) and also one of the conspiratorial extortionists (the party who conspires with others to wrongly obtain possession of the same property)." *Id.* at 23-24; see, *e.g.*, *id.* at 2 (according to government, "to bribe an official is to conspire with that official to victimize oneself"); *id.* at 17 ("It makes no sense to say that the victim of the conspiracy * * * is also a conspirator."); *id.* at 18 ("victimize oneself").

Petitioner's argument overlooks the variety of extortionate schemes covered by official-right extortion. The crime of extortion, which dates from at least the reign of King Edward I, was traditionally viewed not simply as a property crime, but as a transgression directly against the sovereign: The offense was said to be *contra pacem domini regis*—"a breach of the King's peace." Lindgren 833. The word "extortion" may call to mind the predations of a corrupt public official who pressures hapless citizens into paying him tribute, and the Hobbs Act undoubtedly covers such behavior. See *id.* at 842, 850-851 (citing common law cases). Yet the Act *also* undoubtedly covers "the

rough equivalent of what we would now describe as 'taking a bribe.'" *Evans*, 504 U.S. at 260; see *id.* at 267 n.18 ("[B]ribery and extortion as used in the Hobbs Act are not mutually exclusive.") (citation, internal quotation marks, and brackets omitted). When a public official commits extortion of this variety, by selling official acts for private gain, the true "victim" is the public. For as Blackstone explained, "extortion is an abuse of public justice." 4 William Blackstone, *Commentaries on the Laws of England* 141 (1769); see *Wilkie*, 551 U.S. at 564 ("[T]he crime of extortion focused on the harm of public corruption, by the sale of public favors for private gain."). Petitioner's description of the bribe-payor as "the victim of the conspiracy," Pet. Br. 17, is thus at odds with "the core idea" of the Hobbs Act—namely, that "extortion [i]s a species of corruption." *Wilkie*, 551 U.S. at 564 n.12.

The "victim" label is especially inappropriate when the Hobbs Act is interpreted, consistent with *Gebardi*, to impose conspiracy liability only where the bribe-payor's role in the transaction was "more active than mere agreement." 287 U.S. at 119. One who does not merely acquiesce to an official demand, but instead "was the active or moving spirit in conceiving or carrying out" an extortionate scheme, is no victim at all. *Id.* at 117. In such cases, there is "little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the [bribe-payor] always is the victim." *Holte*, 236 U.S. at 145.

This case vividly illustrates the point. Moreno and Mejia recognized that partnering with BPD officers would be "beneficial," and they eagerly joined the kickback scheme in order to increase business to

Majestic. J.A. 95-97. They also took an active role in making the scheme work. Moreno consulted with participating officers to select the cars that would be most profitable to have in his shop. Pet. App. 7-9; J.A. 105-107. To convince insurance companies that damaged vehicles had been rendered undrivable, Moreno and Mejia created phony towing records. J.A. 152-153. Moreno often caused additional damage to cars to ensure maximum insurance reimbursement. J.A. 101-102, 107, 139. Insurance payments were deposited directly into Majestic's business account, which Moreno used to pay officers; Mejia concealed those payments on Majestic's books as "advertising and promotion." J.A. 159; see J.A. 145-147, 149-151. Participation in the kickback scheme was highly lucrative for Moreno and Mejia, eventually resulting in more than 90% of Majestic's business. J.A. 96, 100, 127.

The record thus refutes any suggestion that the shop's owners were the "victims" of this scheme. Indeed, at trial, petitioner's counsel tried to convince the jury that Moreno was its chief executive—that he had "recruited most of the officers," J.A. 127, and had "corrupted a great number of Baltimore City police officers," J.A. 70. See C.A. App. 1226 ("Moreno, and to a lesser extent, his brother, Edwin Mejia, were clearly involved in this conspiracy up to their ears to get policemen to refer cars to them."). Having participated as full partners in the kickback scheme, Moreno and Mejia were petitioner's co-conspirators, not his victims. See J.A. 66 ("That's why kickback schemes are successful. Everybody gets what they want.").

4. "Principles of federalism and lenity" do not justify petitioner's approach

Finally, petitioner appeals to "principles of federalism and lenity." Pet. Br. 42 (capitalization altered). Neither assists him.

a. Petitioner's federalism argument is premised on two errors: first, that "there is no plausible textual support for the government's theory"; and second, that the government's "Hobbs Act interpretation w[ould] transform every payment of a bribe to a state or local official into a federal conspiracy to commit extortion." Pet. Br. 43. For the reasons explained above, he is wrong on both counts. A proper reading of the Hobbs Act would not turn the statute into a general prohibition on paying bribes. Moreover, Congress expressly contemplated that *some* acts of extortion would be made possible by conspiratorial agreements, and it determined that they should be punished. See 18 U.S.C. 1951(a) ("Whoever * * * conspires so to do"). Petitioner offers no reason to believe that his agreement with Moreno and Mejia to facilitate the kickback scheme lay outside Congress's concern.

b. Petitioner's reliance on the rule of lenity fares no better. That rule applies only when a criminal statute contains a "grievous ambiguity or uncertainty." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (citation omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of that rule," *Muscarello*, 524 U.S. at 138. Instead, the rule applies "only if, after seizing everything from which aid can be derived," the

Court "can make no more than a guess as to what Congress intended." *Ibid.* (citation and internal quotation marks omitted). For the reasons described above, petitioner's conspiracy conviction is consistent with the best reading of the statute and with longstanding principles of conspiracy law.

D. Petitioner Also Conspired With Other BPD Officers, Not Only With Moreno And Mejia

Even if petitioner were correct that, in a Hobbs Act conspiracy, there must be an agreement among conspirators other than the bribe-payor, such an agreement existed in this case. As the court of appeals recognized, petitioner's argument "is factually flawed, in that it relies on an evidentiary premise—that his only coconspirators were Moreno and Mejia—that is entirely at odds with the record." Pet. App. 25 n.14. In fact, the indictment against petitioner alleged, and evidence at trial proved, "a wide-ranging conspiracy involving dozens of BPD officers." *Ibid.*

The Superseding Indictment alleged that petitioner "did knowingly and unlawfully combine, conspire, confederate, and agree together, with other Baltimore Police Department Officers," as well as with Moreno and Mejia. J.A. 36; see *ibid.* ("It was a purpose of the conspiracy for Moreno and Mejia to enrich over 50 BPD Officers, including the defendants."). The trial evidence showed that petitioner learned of the kickback scheme from another BPD officer, most likely Officer Rodriguez, who was indicted along with petitioner but pleaded guilty. J.A. 28, 111-114; Pet. App. 7. After Officer Rodriguez told petitioner about the kickback scheme, he and petitioner worked together on at least one occasion, during which petitioner helped Officer Rodriguez and Moreno collect a vehicle

from an accident scene. J.A. 119-123; see J.A. 122 (petitioner and Officer Rodriguez "pretend[ed] that they didn't know each other" at the scene); see also Pet. App. 8-9 & n.7. Petitioner also recruited other officers and brought them in on the scheme. J.A. 125-127, 129-130, 137-138, 172-173. Given all this evidence, "the jury was entitled to find [other participating] BPD officers to be [petitioner's] coconspirator[s]." Pet. App. 25 n.14.

Petitioner says that "the government's theory at trial was that Moreno and Mejia were petitioner's co-conspirators." Pet. Br. 10. That formulation is incomplete at best. Although the government stressed petitioner's ties to the shop's owners, it also emphasized petitioner's ties to other officers: "[T]here are other police officers that you heard about that you also can consider their conduct in determining whether they were part of the conspiracy *and whether there was a conspiracy*." J.A. 197 (emphasis added). Indeed, it is hard to imagine how the jury could believe that petitioner committed extortion—as it obviously did, having convicted him on three counts—yet *not* believe that he participated in the scheme along with other officers.

The indictment and trial evidence thus supported convicting petitioner of participating in a factually lesser-included conspiracy involving only BPD officers. Cf. *United States* v. *Miller*, 471 U.S. 130, 135, 145 (1985) (where indictment can be read to cover a fraudulent scheme that is "much narrower than, though included within, the scheme that the grand jury had alleged," defendant may be convicted of that narrower scheme). Similarly, any error in the jury instructions would have been harmless. Cf. *Skilling* v. *United*

States, 561 U.S. 358, 414 & n.46 (2010) (harmless-error analysis applies "when a jury is instructed on alternative theories of guilt," one of which is "legally invalid," and the jury returns a general verdict). Even if petitioner were correct about the question presented, therefore, his conspiracy conviction should nevertheless be affirmed.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

2. 18 U.S.C. 1951 provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or

the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

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Supreme Court of the United States

SAMUEL OCASIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTRODUCTION

The Hobbs Act's plain text resolves this case. When two people agree to exchange money between themselves, they cannot be convicted of a conspiracy to violate the Hobbs Act because they have not conspired to "obtain[] . . . property from another, with his consent . . . under color of official right." 18 U.S.C. § 1951(b)(2) (emphasis added). No "another" is involved, only themselves.

The government has no answer to the statutory text or the interpretive principles addressed in petitioner's opening brief. Instead, it tries to sow confusion. It refutes claims that petitioner never advanced. It presents the same types of arguments—and commits the same fallacies—that this Court has often rejected. And it conjures up new arguments that contradict positions it took throughout this case, both at trial and in opposing certiorari. These strained attempts to defend its prosecutorial overreach only confirm that the statute does not permit it.

The government's central argument is that if a public official takes a bribe, not only is he guilty of extortion, but he and the bribe-payor are also guilty of conspiring to extort because the bribe-payor agreed to help the official obtain property from someone other than the official himself. But that makes no sense of the statute and cannot be reconciled with basic principles of criminal law. Conspiracy is a specific-intent crime that requires at least *two* parties to agree to an endeavor that, if successful, would satisfy all of the elements of the underlying substantive offense. It is not enough to show that an

official intended to commit a crime and that someone else played some role in the wrongdoing; instead, the government must show that all conspirators had the same specific intent to commit the underlying substantive offense. When a private citizen pays a bribe to a public official, the private citizen does not intend to help the official obtain property from *another*; she intends to help the official obtain property from *herself*. And because the private citizen does not intend to obtain property "from another," the official cannot be guilty of conspiring with her to extort under the Hobbs Act. That straightforward interpretation is confirmed by the government's inability to identify a single pre-Hobbs Act decision involving a conspiracy to extort from a co-conspirator.

Putting aside its wordplay masquerading as interpretation, the government offers no affirmative arguments grounded in the statutory text. The government instead spends most of its time playing defense, conjuring up a crowd of supposed anomalies that could result from interpreting the statute in commonsense fashion. But the government's objections all rely on caricatures of petitioner's position. When properly understood, there is nothing anomalous about applying the statute as written. The government's supposed "anomalies" are merely limits on the government's ability to prosecute as broadly as it would prefer.

There is also no reason the Court should credit any of the government's far-fetched policy reasons for not enforcing the statute. Nor should it accept the government's invitation to replace the statutory text

with an "active participant" test that is too vague to be useful and, if applied as proposed by the government, cannot be squared with the fact that conspiracy is an inchoate crime defined not by actions, but by agreement. Instead, the Court should reject the government's attempts to expand its prosecutorial authority beyond what the text can bear and reverse the decision below.

ARGUMENT

I. The Government Has No Answer To The Hobbs Act's Plain Text.

When two individuals agree to exchange property only between themselves, they have not conspired to obtain property from another with his consent, as the Hobbs Act requires. The government's strained efforts to avoid the statutory text reinforce that its position has no merit.

A. The Government's Attempts To Evade The Statutory Text Fail Because Conspiracy Is A Specific Intent Crime.

The government begins with a general discussion of conspiracy law that does not engage petitioner's arguments. *See* U.S. Br. 15-20. When the government eventually turns to those arguments, it leads with a diversion, emphasizing that prosecutors convicted petitioner under 18 U.S.C. § 371, the general conspiracy statute, and not under the Hobbs Act's specific conspiracy provision, 18 U.S.C. § 1951(a). U.S. Br. 15, 24. The government never raised this argument at the certiorari stage, perhaps because petitioner never contested the point. *See* Pet. Br. 2 (citing 18 U.S.C. § 371). And, in any event,

the government never explains why it matters. Section 371 makes it a crime for "two or more persons [to] conspire . . . to commit any *offense* against the United States." 18 U.S.C. § 371 (emphasis added). The provision does not stand alone; it depends on identifying the "offense" that is the object of the conspiracy. The "offense" here is defined in the Hobbs Act, which prohibits the "obtaining of property from another, with his consent . . . under color of official right." 18 U.S.C. § 1951(b)(2); *see also* JA 36 (superseding indictment). It is *that* substantive offense—and all of its elements—that the government must prove the alleged conspirators agreed to commit. Section 371 thus leads the government right back to the Hobbs Act.

When it addresses the Hobbs Act, the government puts all its weight on a new argument. The government contends that because a person can be part of a conspiracy even if she does not herself *commit* every element of the underlying substantive offense, there also should be no requirement that she *agree* to every element of that offense. U.S. Br. 21-23. According to the government, as long as the official from his perspective is obtaining property from "another," it does not matter that the property belongs to the citizen whose conviction depends on the bizarre conclusion that she has conspired to extort herself.

The government's position cannot be reconciled with basic principles of conspiracy law. Since at least 1611, the gist of conspiracy has been the agreement itself, not the action taken pursuant to that

agreement. *See* Note, *Developments in the Law-Criminal Conspiracy*, 72 HARV. L. REV. 920, 923 (1959) (discussing the *Poulterers Case*). Because conspiracy is an inchoate crime, it requires a showing of "specific intent," which denotes not just "a corrupt or wrongful purpose," *id.* at 935, as the government suggests, but a specific criminal intent on behalf of each of the conspirators "to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Salinas v. United States*, 522 U.S. 52, 65 (1997); *see also Anderson v. United States*, 417 U.S. 211, 223 (1974) (to prove conspiracy, prosecutor "must show that the offender acted with a specific intent"); *United States v. Bailey*, 444 U.S. 394, 405 (1980) (conspiracy requires "heightened culpability").

This Court has held that a "'[c]onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself.'" *Ingram v. United States*, 360 U.S. 672, 678 (1959); *see also United States v. Feola*, 420 U.S. 671, 686, 695 (1975). Moreover, because a conspiracy is a "partnership in crime," *Pinkerton v. United States*, 328 U.S. 640, 644 (1946), each of the conspirators must join together with a "unity of purpose" to accomplish the same objective, *Am. Tobacco Co. v United States*, 328 U.S. 781, 810 (1946), regardless of what acts are taken. In other words, "[a]lthough the government need not prove commission of the substantive offense or even that the conspirators knew all the details of the conspiracy, it must prove that the intended future conduct they agreed upon includes all the elements of the substantive crime." *United States v. Pinckney*, 85

F.3d 4, 8 (2d Cir. 1996) (internal quotation marks and citation omitted).

The government's contrary position disassembles the conspiracy by considering the underlying offense only from the perspective of the public official. But "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). That is why, for example, "the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all." *United States v. Gooding*, 25 U.S. 460, 469 (1827). Because conspiracy requires a "unity of purpose," the elements of the substantive offense must be viewed from the perspective of the conspiracy as a whole.

To convict for conspiracy to extort under the Hobbs Act, the government must therefore prove that at least two individuals—both the public official and the private citizen—each had the specific intent for the official to obtain property "from another." When the only property that changes hands is between a public official and a private citizen who pays a bribe, the private citizen does not have the specific intent to help the official obtain property "from another." The required unity of purpose is lacking, for the private citizen has merely agreed to help the official obtain her own property. As Judge Sutton explained, "[t]hese . . . people did not agree, and could not have agreed, to obtain property from 'another' when no other person was involved—when the property, so far as the record shows, went from one coconspirator . . .

to another." *United States v. Brock*, 501 F.3d 762, 767 (6th Cir. 2007).

The government's inability to answer this logic is best illustrated by its unconvincing riposte to petitioner's hypothetical conversation. In that hypothetical, John proposes to Susan a conspiracy to deprive "another" of property, and Susan is then confused to find that the intended victim, the "another" John has in mind, is herself. Pet. Br. 23. In response, the government imagines that "John might have said: 'Let us agree that I, a public official, will obtain money from another, namely you, by getting your consent through use of my right and authority as a public official." U.S. Br. 23. But this form of the exchange alters the focus of John's proposal from the *class* of potential extortion targets delineated by the statute—the indefinitely large class of third-party "anothers" that could be the conspirators' intended victims—to Susan herself, *a single named individual* ("namely you"). The government thus forgets that particular individuals, while referred to in conversation, are never named in criminal statutes.

More fundamentally, although the government sees nothing strange in its counter-hypothetical, it is a conversation that only a lawyer could dream up. If John wants Susan to agree to pay him for official acts, there is a far more direct way to ask: "Let's agree that I will obtain property from *you* in exchange for my official acts." Similarly, the government's counter-hypothetical includes a redundancy that would seldom, if ever, occur either in real conversation or in statutory language. In the

government's formulation, John says, "[l]et us agree that I" will get "your consent." But no fluent speaker of English would ask for both agreement *and* consent. The government's need to include an awkward redundancy and to insert "namely you" into its hypothetical—thus defining the term "another" to mean the opposite of its ordinary meaning (namely, not "another," but "you")—confirms that its statutory construction is at war with ordinary English usage.

The government relies heavily on *United States v. Holte*, 236 U.S. 140 (1915), but that case only highlights the problems with its atextual position. There, the Court held that a defendant could conspire to violate the Mann Act, which punished "any person who shall knowingly transport . . . *any woman* . . . for the purpose of prostitution or debauchery, or for any other immoral purpose," Pub. L. No. 61-277, ch. 395 § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421) (emphasis added), even though the defendant was the woman who was transported. *Holte*, 236 U.S. at 144-45. Focusing on the statutory text, the Court explained that the defendant could be "within the letter of the act . . . and we see no reason why the act should not be held to apply." *Id.* *Holte* would have been different if Congress, instead of referring to "*any* woman," had defined the substantive offense as "knowingly transport[ing] . . . *another* woman." If that had been what the statute required, the defendant could not have come within the letter of the Act. She could not have intended to transport "another woman" when she agreed only to transport herself.

The statutory language here is even clearer, for the Hobbs Act not only requires that the property be obtained "from another," but also "with his consent." Because each conspirator must intend to bring about every element of the substantive crime, the government's theory would punish a bribe-payor for conspiring to help a public official obtain the bribe-payor's own consent—an odd notion to say the least. The government objects that "[t]he consent of all conspirators is not required, only the consent of the person giving money to the public official." U.S. Br. 24. But petitioner has never suggested otherwise. The person from whom property is obtained is indeed the one who must consent, but "[h]ow do (or why would) [that person] conspire to obtain [his] own consent?" *Brock*, 501 F.3d at 767. The government has no answer.

The statute's contrasting use of the words "whoever" and "another" casts further shade on the government's reading. The Hobbs Act imposes liability on "whoever" conspires to obtain property from "another," making clear that the "whoever" who is subject to liability cannot be the same person as the "another" from whom property is obtained. The same textual problem exists under 18 U.S.C. § 371, which punishes "each" person who "conspire[s] . . . to commit any offense against the United States." Because the "offense against the United States" is Hobbs Act extortion, the government must prove that "each" conspirator specifically intended to further a scheme whereby a public official would obtain property "from another," making clear that the person subject to criminal punishment under Section

371 cannot be the "another" from whom property is obtained.

The government responds by criticizing petitioner for "cobbling together the . . . language of Section 1951(a) ('Whoever' interferes with commerce by 'extortion or attempts or conspires so to do') with the definition of extortion in Section 1951(b)(2) ('obtaining of property from another.')." U.S. Br. 24. But what the government derides as "cobbling together" has a more common name: reading the statute as a whole. *See Burgess v. United States*, 553 U.S. 124, 129-31 (2008) ("Statutory definitions control the meaning of statutory words . . . in the usual case."). The government's interpretive approach cannot be reconciled with that principle. The government nonetheless suggests that "if petitioner were correct that 'Whoever' conspires must also be the person who 'obtain[s]' the property, then *only* public officials could be conspirators, because only public officials can obtain property 'under color of official right.'" U.S. Br. 25. That also mischaracterizes petitioner's argument. The point is not that the "whoever" must be the conspirator who obtains the property; it is that "whoever" refers to the person subject to criminal punishment—whether it is the public official who obtains the property or the private party who agrees to help the official obtain the property. *That* is the person who cannot also be the "another" from whom the property is obtained.

The government likewise suggests that it would be anomalous if the bribe-payor could be the "another" for purposes of substantive extortion but not for purposes of a conspiracy to commit extortion.

U.S. Br. 26. There is nothing anomalous about that at all. In fact, the bribe-payor is the "another" for purposes of both the substantive offense and the conspiracy, as she is the individual from whom the property was obtained. Because she is the "another" in that context, however, she cannot be a co-conspirator, because otherwise she would have to conspire to obtain her own property. That does not "beg[] the question presented." U.S. Br. 27. It merely recognizes that the crime of conspiracy involves an agreement between at least two people who both must have the specific intent to commit the same underlying offense. Although one person on his own can extort property from someone else ("another"), those same two people cannot *conspire to* extort property from "another" when no one else is involved.

B. The Government's Atextual Reading Cannot Be Reconciled With Basic Principles Of Criminal Law.

The government makes little effort to address the problems its position would pose for the network of state and federal statutes that have long governed this area of law. Because every act of extortion-under-color-of-official-right requires the bribe-payor's "consent," the government's approach would turn the Hobbs Act into a blanket prohibition on the paying of bribes, overriding the careful limits Congress has placed on federal bribery statutes. *See* Pet. Br. 25. It would also enable the government to add a conspiracy charge to every count of substantive extortion involving bribery, giving the government additional leverage in plea bargaining and violating

the principle that a conspiracy conviction is supposed to punish something different from the underlying offense. *See* Pet. Br. 37-39.

The government's only response is to suggest that "[o]btaining property with another's 'consent' is not equivalent to forming a conspiratorial agreement," because "[a]s used by the Hobbs Act . . . consent simply indicates the taking of property under circumstances falling short of robbery." U.S. Br. 30, 31. But the government offers no metric for figuring out the difference between a bribe-payor who "agrees" and one who merely "consents." *Cf.* Oxford English Dictionary 760 (2d ed. 1989) (consent: "[t]o agree together"); *id.* at 264 (agree: "to give consent"). And it again forgets that conspiracy is a specific-intent crime. When Susan pays John in exchange for official acts, Susan has both consented to the exchange and formed an agreement to commit the elements of substantive extortion. Under the government's theory, every act of receiving a bribe is therefore equivalent to a conspiratorial agreement, because the bribe-payor intends to assist the official in obtaining property under color of official right.

The government is correct, of course, that the obtaining of property, with consent, "induced by wrongful use of actual or threatened force, violence, or fear" would not be a conspiratorial agreement, and neither would an agreement to pay an official who demands property under false pretense of official right. In those circumstances, the person paying the money does not have the specific intent to commit the elements of substantive extortion. The person facing a threat of violence pays the money to avert the

threat. And the person who encounters a demand under false pretense of official right believes that the official is entitled to the payment, and thus does not intend to facilitate the wrongful obtaining of property. But none of this diminishes petitioner's point: The government's reading would transform every *payment of a bribe* into a conspiracy to extort under the Hobbs Act, laying waste to the many statutes that prohibit bribery in more precisely defined circumstances.

The government's reading would also violate the principle that "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime," the government cannot convict the defendant for both. *Pinkerton*, 328 U.S. at 643. The government suggests that this rule does not apply because Hobbs Act extortion does not "require concerted criminal activity." U.S. Br. 32 n.6. But the type of color-of-official-right extortion at issue here—voluntary payments made in exchange for official acts—certainly requires "a plurality of criminal agents." *Iannelli v. United States*, 420 U.S. 770, 785 (1975). Nor would the "circumstances of this case . . . fall under the so-called third-party exception," U.S. Br. 32 n.6, as the jury could have found an agreement between only petitioner and the repair shop owners.

With its many diversions swept aside, the government has nothing left to say. It makes no effort to explain why Congress would have enacted 18 U.S.C. § 666—or any other federal bribery statute—if a Hobbs Act conspiracy already covered

the same territory and more. *See* Pet. Br. 25. It makes no attempt to justify the intrusion on state bribery laws that its position would create. Nor does it so much as acknowledge the principle that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones v. United States*, 529 U.S. 848, 858 (2000). The government also does not dispute that early English and state cases involved conspiracies between two or more people to obtain property from some other person outside the conspiracy. *See* Pet. Br. 39-41. In fact, the government does not identify a single early decision involving a conspiracy to extort property from a co-conspirator.

II. The Government Has No Persuasive Reasons To Depart From The Hobbs Act's Text.

The government offers a host of policy reasons for not complying with the statute. These arguments are unpersuasive and far outweighed by the many reasons to apply the statutory text as written and as Congress intended.

The government claims, for instance, that "petitioner's reading would . . . create a substantial loophole in conspiracy law, because many federal criminal statutes use phrases like 'from another' or 'to another." U.S. Br. 28. But this case does not require the Court to announce any judgment on how the word "another" is used in other statutes. Statutory language is read in context and in light of its place in the overall statutory scheme. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120,

133 (2000); *see also Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (recognizing that statutory terms may have different meanings within the same statute). Especially when interpreting criminal statutes, there is no warrant for making sweeping judgments about the meaning of statutory terms ripped out of context.

In any event, there is nothing troubling about interpreting the word "another" according to its ordinary meaning. The government's example proves the point. Suggesting that reading the text as written could somehow affect the government's ability to prosecute spies, the government notes that federal law punishes federal employees who "obtain[] from another" any coded information and without authorization "willfully publish[] or furnish[]" that information "to another." U.S. Br. 28 (citing 18 U.S.C. § 952). Imagining "a State Department employee who forms an illicit agreement to acquire coded information from a Ukrainian spy and sell it to his contact in the Russian government," the government claims that "[u]nder petitioner's interpretation, *none* of the three participants in that scenario would face conspiracy liability: The conspirators would be incapable of 'obtain[ing] from another' or 'furnish[ing] to another.'" U.S. Br. 28-29.

But why does that matter? Even if the government could not prosecute for conspiracy under 18 U.S.C. § 952, Congress has enacted many other provisions targeting similar conduct. There is no reason the government could not use these other provisions to pursue a conspiracy conviction. For example, the government could potentially prosecute

the State Department employee, the Ukrainian spy, and the Russian official for conspiracy to violate 18 U.S.C. § 798(a), which punishes "[w]hoever knowingly and willfully communicates . . . to an unauthorized person . . . for the benefit of any foreign government . . . any classified information." The Ukrainian spy might also be prosecuted under 18 U.S.C. § 951, which punishes agents of foreign governments who act secretly in the United States. And if *two* State Department employees formed an agreement to acquire coded information from the Ukrainian spy and sell it to a contact in the Russian government, the employees could be punished for conspiracy to violate 18 U.S.C. § 952.

The criminal code contains many other prosecutorial tools that fill in the supposed "gaps" the government fears. Many conspiracies to forge writings for the purpose of obtaining money from the United States, for example, could be punished under 18 U.S.C. § 510 (forging Treasury checks or bonds or securities), or under 18 U.S.C. § 1343 (wire fraud). A conspiracy to forge a money order might be punished under the first paragraph of 18 U.S.C. § 500, and a conspiracy to forge a passport for the use of another would probably be covered by the first paragraph of 18 U.S.C. § 1543. These examples show that Congress "knows how to" create conspiracy liability "when it wishes to do so." *Whitfield v. United States*, 543 U.S. 209, 216 (2005). The government has more than enough federal crimes in its arsenal. There is no need for it to torture the text of ones that do not apply.

The government also suggests that applying the Hobbs Act as written could "create serious conceptual problems in cases involving . . . artificial entities" like businesses or unions. U.S. Br. 27-28. But there is no reason basic principles of corporate law would not be up to the task. As this Court has emphasized, "incorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001). Indeed, "[f]ew norms are more deeply ingrained into the fabric of American law than the principle that 'a corporation and its stockholders are deemed separate entities.'" Br. for United States at 23, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (Nos. 13-354, et al.), 2014 WL 173486 (quoting *New Colonial Ice Co. v. Helvering*, 292 U.S. 435, 442 (1934)). *Cedric Kushner* itself held that a corporate officer could be punished for violating the Racketeer Influenced and Corrupt Organizations Act because "the employee and the corporation are different 'persons,'" *Cedric Kushner*, 533 U.S. at 163, demonstrating that liability indeed can "turn on the particular . . . form of the entity." U.S. Br. 28 n.5.

The government argues that giving the statutory text its ordinary meaning "would perversely penalize the government for alleging and proving additional facts at trial." U.S. Br. 27. Here, again, the government has distorted petitioner's position. Petitioner has never contended that the fact of an agreement between an official and property owners makes an otherwise criminal conspiracy non-

criminal, thereby penalizing the government for proving too much. Quite the opposite: the problem with the government's position is that it allows the government to convict a defendant while proving *too little*, as this case well illustrates. At trial, the government thought it needed to prove only that petitioner and the repair shop owners formed an agreement to exchange property between *themselves*. While the government alleged that petitioner participated in a larger conspiracy involving other police officers, it made no effort to prove that petitioner directly agreed with those officers to obtain property from third parties. As a result, the jury convicted petitioner without finding that petitioner formed an agreement with anyone outside the conspiracy.

If the government had litigated this case differently—that is, if the government had tried to prove an agreement between petitioner and other police officers to obtain property from someone outside the conspiracy—the government may well have failed to secure a conviction. Indeed, the whole problem with petitioner's trial is that the government gained all the litigation advantages of a conspiracy charge without having to meet its burden of proof. It does not penalize the government to require that it prove the elements of the crime it has chosen to prosecute.

The government tries to reassure the Court that "any error in the jury instructions would have been harmless" because "it is hard to imagine how the jury could believe that petitioner committed extortion . . . yet *not* believe that he participated in the scheme

along with other officers." U.S. Br. 44. But merely committing a crime "along with" others is not a conspiracy; what is required is an *agreement* between the supposed co-conspirators. And the jury never found—nor was it asked to find—that petitioner formed an agreement with other police officers to extort property from the repair shop owners. Instead, the government's strategy throughout trial focused on connecting petitioner with the repair shop owners, not with other officers. *See, e.g.*, JA 64-66, 95-98. Although the government asserted in the indictment that petitioner participated in a broad conspiracy, and it now cites isolated snippets from the record where other officers were discussed, it never sought to show a direct agreement *between* officers; the repair shop owners were supposed co-conspirators at the center of a conspiracy linking all the officers together.

In other words, "the pattern" the government attempted to prove "was that of separate spokes meeting [in] a common center, though . . . without the rim of the wheel to enclose the spokes." *Kotteakos v. United States*, 328 U.S. 750, 755 (1946) (internal quotation marks omitted). Because "[t]hieves who dispose of their loot to a single receiver—a single fence—do not by that fact alone become confederates," *id.*, it cannot be assumed that they are all part of the same conspiracy absent proof that they agreed to participate in a broader conspiracy. If anything, "[t]he proof" offered by the government here "made out a case, not of a single conspiracy," but of multiple different instances of police officers agreeing to receive bribes from the repair shop owners. *Id.*

For that reason, petitioner was entitled to a judgment of acquittal on the conspiracy charge. As this Court has cautioned, jury instructions should "scrupulously safeguard each defendant individually, as far as possible, from loss of identity in the mass" in order to "protect[] against unwarranted imputation of guilt from others' conduct." *Id.* at 776-77. In this case, the jury instructions did not accomplish that task. Even if there were some possibility—contrary to the evidence presented and the government's strategy—that the jury might have convicted based on a legitimate theory, reversal would still be required. *See Skilling v. United States*, 561 U.S. 358, 414 (2010) ("[C]onstitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory.").

III. The "Active Participant" Standard Cannot Rescue The Government's Position.

The Fourth Circuit's decision warrants reversal not only because it fails to apply the statutory text, but also because it replaces the elements of the offense with an unmanageable "active participant" test. At the certiorari stage, the government maintained that the Fourth Circuit's test merely restates basic conspiracy principles. *See* Opp. 9. Shifting positions, the government now suggests that the test adds something in situations "where Congress has chosen to criminalize only one half of a transaction that typically involves consent or acquiescence"; in that situation, the government says, "conspiracy liability should presumptively

require a higher level of coordinated activity" on the part of the bribe-payor. U.S. Br. 34.

The government's "higher level of coordinated activity" test cannot be reconciled with basic conspiracy law. To be guilty of conspiracy, a defendant need not actively participate in anything; he simply must agree. As this Court has held, "a conspiracy to commit [the substantive] offense is nothing more than an *agreement* to engage in the prohibited conduct." *Feola*, 420 U.S. at 687 (emphasis added); *see also Iannelli*, 420 U.S. at 777 ("Conspiracy is an inchoate offense, the essence of which is an *agreement* to commit an unlawful act." (emphasis added)). Indeed, the government has insisted elsewhere that "proof of an overt act is not required to establish the crime of conspiracy to violate the Hobbs Act, in violation of 18 U.S.C. 1951(a)." Br. for United States at 7, *Salahuddin v. Dennison*, 135 S. Ct. 2309 (Mem) (2015) (No. 14-654), 2015 WL 1534352. And as the jury instructions in this case make clear, although a Section 371 conspiracy does require an overt act, the government need not prove that the bribe-payor was the one who committed it. *See* JA 217-18 ("It is sufficient for the government to show that *one* of the conspirators knowingly committed an overt act"). If the government does not need to prove that the bribe-payor did *anything*, how can it be required to prove a "higher level of coordinated activity"?

This Court's decisions in *Holte* and *Gebardi* also do not support replacing the statutory elements of the offense with an unwritten active-participant test. In both cases, the Court suggested that a woman who

actively procured her own transportation could be convicted for aiding and abetting or conspiring to violate the Mann Act. *Holte* and *Gebardi* are best understood not as replacing the elements of conspiracy with an active-participant test, but as addressing what evidence may be relied on to prove that a defendant specifically intended to accomplish the purposes of the conspiracy. *See Glasser v. United* States, 315 U.S. 60, 80 (1942) ("Participation in a . . . conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and collocation of circumstances."), *superseded by statute on other grounds*. The government also claims that, "[f]or decades, lower courts have permitted bribe-payors to face aiding-and-abetting liability for actively participating in bribery schemes." U.S. Br. 36. But that improperly conflates aiding and abetting, which requires proof of affirmative acts beyond agreement, with conspiracy, which does not. *See Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014) (explaining that the general aiding-and-abetting statute "reflects a centuries-old view of culpability: . . . a person may be responsible for a crime he has not personally carried out if he *helps another to complete its commission*.") (emphasis added).

The government's vigorous defense of its new "higher level of coordinated activity" test is doubly strange, because the jury instructions in this case had nothing to say about it. Consistent with basic conspiracy principles, the trial court instructed the jury that it could "infer . . . the existence of an agreement" from "the conduct of the parties involved." JA 213-14. In a footnote, the government

observes that the jury instructions "caution[ed]" that "mere knowledge or acquiescence, without participation in the unlawful plan, [was] not sufficient." U.S. Br. 35 n.7 (citing JA 195). But that instruction does not reflect the government's "higher level of coordinated activity" test. Instead, it is word-for-word the model instruction that applies to *all* conspiracy cases. *See* Leonard Sand, et al., *Model Federal Jury Instructions* § 19.01 (2015) ("I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient."). That instruction reflects the government's certiorari-stage position: the active-participant test merely restates the basic conspiracy principle that the government must prove an *agreement*. If *that* is all the test means, then it does nothing to prevent the government's interpretation from turning every payment of a bribe into a conspiracy to commit extortion. If the test is to avoid that problem, it has to do additional work beyond merely requiring a knowing agreement.

The government's attempt to defend the active-participant test thus underscores the problems with its position. If the government's test requires courts to "ascertain what level of enthusiasm, ambivalence or regret is required to escape prosecution," *Brock*, 501 F.3d at 771, then it is vague and unworkable. The Court can avoid this confusion entirely by reading the statute according to its plain text.

CONCLUSION

The Fourth Circuit's decision should be reversed and the case remanded for further proceedings.

August 31, 2015

Respectfully submitted.

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No. 14-361

IN THE

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v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR FORMER UNITED STATES ATTORNEYS AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are all former United States Attorneys.[1] Each has substantial experience with federal criminal prosecutions and each deeply values the essential role of federal prosecutors in the American system of justice. *Amici* recognize that the respect they received as representatives of the Department of Justice was the legacy of those who preceded them. Federal prosecutors earned the public's confidence by tirelessly—yet measuredly—

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person or persons other than *amici* and their counsel made such a monetary contribution. Petitioner's letter consenting to the filing of *amicus* briefs, and respondent's letter consenting to the filing of this brief, are on file with the Clerk's office.

upholding the rule of law in the pursuit of justice. Equally, however, the integrity of federal prosecutions today is essential to safeguarding the independence and public esteem of tomorrow's federal prosecutors.

For this reason, *amici* share a common interest in the present case, which provides an opportunity to ensure that the public clearly recognizes that the extraordinarily powerful federal system of criminal justice operates strictly within the limits of the law. By reversing the judgment below, such a holding here may appear at first glance to slightly limit some tools that federal prosecutors might wield in individual cases. But, to the contrary, that holding would *strengthen* federal prosecutors' enduring and historic institutional role by demonstrating that any conviction they win results from an unquestionably just application of the laws of Congress.

Amici are the following former United States Attorneys:

- James S. Brady (Western District of Michigan)
- Roscoe C. Howard, Jr. (District of Columbia)
- Gregory G. Lockhart (Southern District of Ohio)
- Matthew D. Orwig (Eastern District of Texas)
- John C. Richter (Western District of Oklahoma)[2]
- Joseph P. Russoniello (Northern District of California)
- Kevin V. Ryan (Northern District of California)
- Larry D. Thompson (Northern District of Georgia, and former Deputy Attorney General)
- Stanley A. Twardy, Jr. (District of Connecticut)

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[2] Mr. Richter is currently a partner at King & Spalding, which is counsel for petitioner. Mr. Richter did not participate in the preparation of petitioner's brief and appears as *amicus* in his individual capacity and not as a representative of his firm.

SUMMARY OF ARGUMENT

Federal prosecutors play an integral and venerable role in the American system of justice and law enforcement. As directed by statute, federal prosecutors are responsible for ensuring that our Nation's criminal laws are faithfully executed. To discharge that massive obligation, prosecutors rightly enjoy broad discretion and independence; this follows from the confidence reposed in the relatively few men and women who devote themselves to this calling. The courts are generally—and, again, rightly—reluctant to interfere with prosecutorial decisionmaking.

But this system is predicated on the assumption that prosecutors themselves unflinchingly honor whatever limitations *do* govern them, and that the courts likewise insist upon adherence to those limits. It is widely recognized that federal prosecutors (and the Department itself) typically possess sufficient self-discipline to avoid pushing the envelope just to make desired results easier in particular cases. This recognition greatly *strengthens* the efficacy of the Department of Justice and significantly enhances the prestige of federal prosecutors, whose decisions benefit from presumptions of accuracy and integrity. No short-term or issue-specific short-cut is worth risking that widespread public confidence, which is an essential ingredient necessary to maintain the rule of law.

Near the top of the list, therefore, prosecutors must enforce statutes only within the bounds that Congress has authorized; this is indispensable for proving the legitimacy of the resulting prosecutions. Stretching beyond statutory bounds constitutes prosecutorial overreach. While tempting in the moment, and indeed laudable in the desire to penalize conduct that truly deserves censure, prosecutions that exceed congressional authorization can generate unintended consequences in the law itself—it is difficult to put the genie back in the bottle,

even when his services are no longer desired. Worse, such prosecutions can undermine the Department's credibility. This, in turn, can damage the cherished independence of federal prosecutors, because the perception or reality of overreach will trigger judicial intervention and engender public doubt.

Overreach by federal prosecutors can also lead to the criminalization of conduct traditionally dealt with by the States. Such overreach not only creates tension in the federal-state balance in the prosecution of crimes, but can lead to the trivialization of prosecutions commenced by the United States Attorneys.

Petitioner Ocasio's conviction for conspiracy to commit extortion under the Hobbs Act is an example of prosecutorial overreach that illustrates the concerns highlighted by *amici*. Ocasio's conspiracy conviction lacks credibility because he was convicted under a theory that he formed an agreement with the very persons *from whom he extracted bribery payments*. This theory not only contravenes the statute's plain text, but is completely at odds with the commonsense understanding of what a conspiracy entails—that is, conspirators do not conspire to take *from themselves*.

Likewise, the construction of the Hobbs Act at issue here would unjustifiably expand federal law and encroach upon existing and adequate state criminal laws that already prohibit their private citizens from bribing public officials. Invocation of the Hobbs Act to curb mere bribery payments—as reprehensible as such conduct surely is—undercuts the congressional objective of holding those entrusted with a public trust to a special level of account. The Court should accordingly reverse the judgment below.

ARGUMENT

I. PROSECUTORS ENJOY BROAD DISCRETION BUT MAY NOT ENFORCE CRIMINAL STATUTES BEYOND THE LIMITS CONGRESS IMPOSES

Prosecutorial discretion is a vital component of the federal criminal justice system. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). "The Attorney General and United States Attorneys retain 'broad discretion' to enforce the Nation's criminal laws." *Ibid.* (quoting *Wayte* v. *United States*, 470 U.S. 598, 607 (1985)); see also *United States* v. *Goodwin*, 457 U.S. 368, 380 n.11 (1982). Prosecutors enjoy this wide "latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'" *Armstrong*, 517 U.S. at 464 (quoting U.S. Const. art. II, § 3); see also 28 U.S.C. §§ 516, 547 (outlining duties of federal prosecutors).

A "presumption of regularity supports" the discretionary decisions made by prosecutors. *United States* v. *Chem. Found., Inc.*, 272 U.S. 1, 14 (1926). "[I]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their duties." *Armstrong*, 517 U.S. at 464 (quoting *Chem. Found.*, 272 U.S. at 14-15). Thus, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978).

Judicial deference to prosecutors "stems from a concern not to unnecessarily impair the performance of a core executive constitutional function." *Armstrong*, 517 U.S. at 465. This Court has observed that "[e]xamining

the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte*, 470 U.S. at 607. Practical considerations also play a role in the deference that courts afford prosecutors. Courts are less "competent to undertake" an analysis of certain factors like "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Ibid.*

A prosecutor's discretion, however, is not wholly unbridled. Of particular importance here, prosecutors are subject to statutory constraints. Indeed, legislative boundaries are fundamental, for federal prosecutions are purely a creature of statute. See *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812). A prosecutor's enforcement of a criminal statute that stretches beyond the plain meaning of its text obfuscates the intent of Congress and undermines the balance of powers between the legislative and executive branches of government. When that happens, the judiciary—the branch of government vested with interpreting the law, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)—is uniquely situated to curb prosecutorial overreach. That judicial role not only protects the separation of powers and ensures the integrity of prosecutions brought by the federal government, but also functions as a guardian of liberty. See *Armstrong*, 517 U.S. at 464 (the Constitution empowers the courts to intervene and "exercise judicial power over a[n otherwise] 'special province' of the Executive") (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985)).

II. This Prosecution Exceeds Statutory Authority

In this case, the prosecution's strained and unnatural reading of the Hobbs Act—adopted by the Fourth Circuit—is the very type of prosecutorial overreach that *amici* view as detrimental to the role of federal prosecution within our constitutional system. Petitioner Ocasio, a former Baltimore police officer, was charged with and convicted of extortion and conspiracy to commit extortion under the Hobbs Act based upon his agreement with the owners of an auto repair shop to steer damaged vehicles to their garage in exchange for cash payments. While Ocasio's convictions on the substantive extortion counts are not directly at issue, his conviction *for conspiracy* contravenes basic tenets of statutory interpretation.

The Hobbs Act proscribes conduct that "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion." 18 U.S.C. § 1951. Any attempt or conspiracy to engage in such conduct also violates the Hobbs Act. See *ibid.* As relevant here, "extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." *Id.* § 1951(b)(2).

Interpretation of "property *from another*" lies at the heart of this case. The Government postulates that a conspiracy to obtain property "from another" can encompass an agreement between two parties to exchange property *between themselves*. This is illogical. Acceptance of this reading of the Hobbs Act would eviscerate the "from another" requirement that Congress purposely embedded within the statute; it would treat the term as surplusage, as its omission would not alter the substantive reach of the statute, as understood by the court below. This Court should conclude that Congress could not have intended such a result. "Judges should

hesitate to treat statutory terms in any setting as surplusage, and resistance should be heightened when the words describe an element of a criminal offense." *Jones* v. *United States*, 529 U.S. 848, 857 (2000) (internal citations, quotation marks, brackets, and ellipsis omitted).

The normal understanding of "property from another" should be adopted even if there were some plausible textual basis for the Fourth Circuit's embrace of the Government's reading. After all, this Court has expressly extended the "rule of lenity" to the Hobbs Act. See *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393, 408-409 (2003). "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 409 (internal quotation marks omitted). Correspondingly, the judiciary must decline when prosecutors seek judicial enlargement of the Hobbs Act's reach, for "significant expansion of the law's coverage must come from Congress, and not from the courts." *Ibid.*

Unlike the Fourth Circuit, the Sixth Circuit has properly applied these principles. When faced with facts similar to those presented here, and confronting the same textual question, the Sixth Circuit declined to adopt the prosecution's argument that a payment agreement among alleged conspirators satisfied the "property from another" requirement of the Hobbs Act. See *United States* v. *Brock*, 501 F.3d 762, 767 (6th Cir. 2007) (Sutton, J.). The court correctly held that a conspiracy to commit extortion under the Hobbs Act necessarily requires proof of an agreement "to obtain property from someone *outside* the conspiracy," *i.e.*, property from another. See *ibid.* (emphasis added). This Court should adopt the Sixth Circuit's straightforward interpretation of the Hobbs Act and conclude that a conspiracy to commit extortion involving a public official may only be sustained

where the public official forms an agreement to procure property from someone outside the conspiracy. This common-sense approach would effectuate the plain meaning of the Hobbs Act and ensure the Government's authority under the statute remains within the bounds authorized by Congress.

Expansion of the Hobbs Act beyond its text has broader implications than sustaining the prosecution of Ocasio for conspiring with the very "victims" from whom he received extortive payments. The prosecution's interpretation of the Hobbs Act, if countenanced, would bring every act of bribery of a public official within a Hobbs Act conspiracy as two parties agreeing to exchange property between themselves. This would encompass both the public official accepting the bribe (as in the prosecution here) and the private citizen paying the bribe (as in *Brock*). Congress did not intend for *federal* prosecutors to have such automatically broad jurisdiction.

Congress enacted the Hobbs Act "to prohibit public officials from obtaining property from others by extortion." *Brock*, 501 F.3d at 768. The decision by Congress not to include bribery within the Hobbs Act reach was purposeful. State bribery laws adequately address the unlawful payment of public officials by private actors, rendering the Government and the Fourth Circuit's interpretation of the Hobbs Act below unnecessary. "No one doubts that the States have criminal laws prohibiting their citizens from bribing public officials." *Id.* at 769. Furthermore, "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *United States* v. *Bass*, 404 U.S. 336, 349 (1971).

This Court has observed that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Jones*, 529 U.S. at 858 (citation

and internal quotation marks omitted). Here, had Congress sought to forbid bribery under the Hobbs Act, it would have explicitly done so. As the Sixth Circuit noted in *Brock*, Congress has statutorily proscribed the giving or offering of bribes in other contexts. See 501 F.3d at 768 (citing, *e.g.*, 18 U.S.C. § 201(b)(1) ("making it an offense to 'give[ ], offer[ ], or promise[ ] anything of value to any [federal] official'"); *id.* § 210 ("making it an offense to 'pay[ ] or offer[ ] or promise[ ] any money or thing of value, to any person, firm, or corporation in consideration of the use or promise to use any influence to procure any appointive office or place under the United States for any person'")). No such similar language exists within the Hobbs Act. But absent such clear language, the Government's position turns, in the most charitable reading, on an ambiguity in the statute, which simply triggers application of the "rule of lenity." See *supra* at 8 (citing *Scheidler*, 537 U.S. at 408-409).

There are sound policy reasons why Congress authorized federal prosecutors to prosecute corrupt state officials who accept bribes under the Hobbs Act as extortionists but not, at least without more, the private individuals who pay those bribes. State prosecutors may not be as well-equipped to independently investigate and pursue the criminal activity of other state actors, leaving private citizens more susceptible to extortion and without legal recourse to protect their rights. But that reasoning applies less, if at all, to the prosecution of private citizens. State prosecutors routinely and without incident engage in the impartial investigation and prosecution of private individuals for bribery and other offenses.

The commingling of public-official extortion and private-citizen bribery under the Hobbs Act not only undeservedly alters the federal-state balance in the prosecution of crimes, but it diminishes the import of the Hobbs Act itself. The announcement of a Hobbs Act indictment

or conviction by a federal prosecutor should mean something. The Hobbs Act should not be called upon every time a private individual engages in the mere act of bribery, but should be reserved for those prosecutions where a public official engages in the harmful and serious crime of extortion.

III. Prosecutorial Overreach Tarnishes Prosecutors' Credibility And Undermines Their Independence

The prosecutorial overreach in this case is not entirely isolated. This Court recently overturned the convictions of two defendants based upon the over-aggressive applications of statutes by federal prosecutors. See *Yates* v. *United States*, 135 S. Ct. 1074 (2015); *Bond* v. *United States*, 134 S. Ct. 2077 (2014). Those cases are important and instructive in the present context. They caution against the emboldened prosecutor willing to invoke a statute beyond the authority vested by Congress.

In *Yates*, federal authorities determined that a commercial fisherman had concealed his unlawful harvesting of undersized fish. See 135 S. Ct. at 1079-1080. This conduct resulted in an indictment charging Yates with "destroying, concealing, and covering up undersized fish to impede a federal investigation in violation of" a provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C § 1519. See *Yates*, 135 S. Ct. at 1080.

Congress enacted § 1519 "to protect investors and restore trust in financial markets following the collapse of Enron Corporation." *Id.* at 1079. Despite the undisputed legislative purpose of the statute, the Government construed the term "tangible object" in § 1519 to encompass the fish thrown overboard by the crew member. The prosecution espoused the theory that § 1519 constituted "a general ban on the spoliation of evidence, covering all physical items that might be relevant to any matter un-

der federal investigation." *Id.* at 1081.

The Court rejected the Government's "unrestrained reading" of the term "tangible object," concluding that Congress clearly intended § 1519 "to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing." *Id.* at 1081. In reversing the conviction under § 1519, the Court employed "traditional tools of statutory interpretation" and held that it was "highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping." *Id.* at 1087.

If anything, however, *Yates* was a closer case than this one. There was, after all, some force to the Government's textual argument in *Yates*. See, *e.g.*, *id.* at 1090-1101 (Kagan, J., dissenting). If that comparatively stronger argument was ultimately rejected, the Government's far weaker construction here cannot survive.

Bond illustrates another example of prosecutorial overreach. In that case, Bond was convicted of a violation of the Chemical Weapons Convention Implementation Act, which "forbids any person knowingly 'to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon.'" 134 S. Ct. at 2085 (quoting 18 U.S.C. § 229(a)(1)). Congress passed § 229(a) in 1998 to implement a treaty that the President, upon the advice and consent of the Senate, had ratified in the prior year. See *id.* at 2083. The stated goal of the treaty, which like § 229(a) proscribed the use or possession of any chemical weapon, was for the eventual "'elimination of all types of weapons of *mass destruction*.'" *Ibid.* (quoting S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317) (emphasis added).

The conviction under § 229(a) in *Bond* stemmed from

Bond's placement of certain harmful (and potentially lethal) chemicals at the home and on the car of her husband's paramour, who sustained a minor burn to her thumb. See 134 S. Ct. at 2085. The prosecution, at trial and on appeal, maintained that Bond's conduct fell squarely within the ambit of § 229(a), insisting, *inter alia*, that the chemicals she dispersed were "toxic chemicals," as defined by the statute.

This Court understandably expressed grave concern with the prosecution's expansive interpretation of § 229(a), which "would transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults." *Id.* at 2091-2092. The Government's reading of the statute, the Court observed, would have the effect of "'dramatically intrud[ing] upon traditional state criminal jurisdiction." *Id.* at 2088 (quoting *Bass*, 404 U.S. at 350) (alteration added). Absent a clear intent from Congress "that the law should have such reach," the Court noted it would not interpret § 229(a) in a way that would encroach upon the enforcement of "local criminal activity" left "primarily to the States." *Id.* at 2083. In examining § 229(a) and ultimately reversing the conviction, this Court found no evidence that Congress intended for the statute to reach purely local crimes that did not implicate global chemical warfare. See *id.* at 2093-2094.

The outcomes in *Yates* and *Bond* exemplify the concerns raised by *amici* now. As here, the prosecutions in *Yates* and *Bond* produced highly questionable results, which flowed from an unjustifiable stretching of statutory authority. Yates should have never been prosecuted for the unlawful harvesting of fish under a provision of the Sarbanes-Oxley Act. Bond's simple act of assault within a love triangle should not have been prosecuted under a statute designed to punish the possession and

proliferation of weapons of mass destruction.[3] And nor should Ocasio—already charged with multiple substantive counts of extortion—have been prosecuted for conspiracy to commit extortion under a theory that he and his co-conspirators formed an agreement to take money from themselves. Each case, individually and collectively, undermines the integrity that the Attorney General, the United States Attorneys, and the men and women of the Department of Justice strive to achieve in the vast bulk of their important and honorable work. While the relative rarity of overreach is worth celebrating, that does not make it any less important to quickly identify and eliminate overreach when it does occur.

The prosecutorial overreach present in these cases risks compromising the presumption of regularity that normally supports federal prosecutions. See *Chem. Found.*, 272 U.S. at 14-15. And it threatens the independence that federal prosecutors have long enjoyed. Judicial deference to prosecutorial decisionmaking depends on courts *not needing* to second-guess and scrutinize the charging decisions of federal prosecutors.

Reversal of the judgment below, therefore, would signal an important message to federal prosecutors and to the public. It will reinforce what federal prosecutors already generally know—that their faithful execution of our Nation's laws must be within the bounds Congress authorizes. Reversal will not only prevent erosion of that principle, but will also contribute to the public's justifiable confidence that prosecutions brought by the Department of Justice merit deep respect—not only because federal prosecutors themselves are committed to the rule of law, as they are, but because the federal judiciary is

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[3] As noted earlier, the prosecution of the petitioner for assault in *Bond*, like here, also unduly encroached upon "conduct readily denounced as criminal by the States." *Bass*, 404 U.S. at 349.

also vigilant to protect the functioning of the criminal-justice system.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted.

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No. 14-361

In the Supreme Court of the United States

SAMUEL OCASIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association working on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct.[1]

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 including affiliates' membership. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in the ABA House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice and files numerous *amicus* briefs each year in this Court and other federal and state courts, addressing issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored any part of the brief, and no person or entity, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief. The parties' consents to the filing of this brief are on file with the Clerk's office.

NACDL has a particular interest in this case because the Hobbs Act, as interpreted by the federal government and some courts, has been transformed into a vague, expansive criminal statute with draconian penalties. These broad interpretations provide little notice of the conduct supposedly criminalized and give prosecutors far too much discretion to decide whom to punish. This case provides the Court with an opportunity to begin to restore the Hobbs Act to the limited scope enacted by Congress.

SUMMARY OF ARGUMENT

The question in this case is whether the Hobbs Act offense of conspiracy to commit extortion encompasses an agreement to obtain property through extortion from one of the alleged conspirators, even though the statute defines "extortion" as "the obtaining of property *from another*." 18 U.S.C. § 1951(b)(2) (emphasis added).

Petitioner explains in detail why the statutory text and structure preclude the government's expansive interpretation of the statute. This *amicus* brief explains why two fundamental principles governing construction of federal criminal laws require the same result.

This Court has made clear that the conduct proscribed by a criminal law must be defined "with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). The government's position in this case plainly violates that principle—the reference to "from another" is at the minimum ambiguous, and the statute therefore must be construed to require proof that property was obtained from a non-conspirator. Failure to adhere to that principle

here produces all of the adverse consequences that the due process rule is designed to prevent: lack of clarity regarding the scope of criminal liability; definition of a criminal offense by courts rather than Congress; and expansion in the unreviewable discretion exercised by prosecutors.

Federal criminal laws also must be interpreted with appropriate regard for principles of federalism—the Court will not construe federal law to encompass matters traditionally addressed by state law absent a clear indication that Congress intended that result. The government's expansive view of the Hobbs Act conspiracy offense would reach any individual alleged to have bribed any state or local official, and impose a sentence of up to twenty years in prison. Bribery of government officials is criminalized by the laws of every State, and is obviously a matter of significant local concern. Interpreting the Hobbs Act so broadly would plainly upset the federal-state balance—and there is no evidence that Congress intended that result. This principle, too, requires rejection of the government's position.

ARGUMENT

A HOBBS ACT CONSPIRACY CHARGE REQUIRES PROOF OF AN AGREEMENT TO OBTAIN PROPERTY FROM A THIRD PARTY.

The Hobbs Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). Petitioner demonstrates that the statute's plain language—requiring "the obtaining of property *from another*"—means that a Hobbs Act conspiracy charge cannot be satisfied by proof of an

agreement to obtain property from one of the conspirators. Pet. Br. 20-42.

The government's position, that "another" can be interpreted to include individuals who are members of the alleged conspiracy, is yet another example of what have become all-too-familiar phenomena. *First*, broadening of criminal offenses beyond the bounds set by unambiguous statutory text, with the concomitant expansion in the essentially unreviewable discretion exercised by federal prosecutors. *Second*, intrusion of federal criminal law into areas long reserved to the States without clear authorization by Congress. In deciding this case, the Court should make clear that lower courts—and prosecutors making charging decisions—must construe federal criminal laws in a manner that prevents, rather than produces, these illegitimate consequences.

A. The Unambiguous Meaning Of The Text Enacted By Congress Delineates The Outer Bounds Of The Hobbs Act Offense.

The principle that the scope of a criminal offense is limited to the reach of its unambiguous plain language is rooted in fundamental constitutional principles. "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see also *Skilling* v. *United States*, 561 U.S. 358, 402 (2010) (criminal offense must be defined "'with sufficient definiteness that ordinary people can understand what conduct is prohibited'") (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)).

Statutory language that is ambiguous by definition cannot provide the requisite fair notice. "Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 393 (1926). For that reason, the Court follows "the rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000)); see also *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) ("[a]pplication of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal").

Providing fair notice of conduct that is criminal is the principal reason why a criminal offense is limited to the acts unambiguously encompassed within the statutory language, but this principle serves other important purposes as well—"strik[ing] the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427.

"Federal crimes are defined by Congress, not the courts." *United States* v. *Lanier*, 520 U.S. 259, 267 n.6 (1997); see also *United States* v. *Bass*, 404 U.S. 336, 348 (1971) ("[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity."); *United States* v. *Evans*, 333 U.S. 483, 486 (1948) (in the federal system, "defining crimes and fixing penalties are legislative, not judi-

cial, functions"). Imposing criminal liability based on ambiguous statutory text carries the significant risk of exceeding the bounds authorized by Congress.

Moreover, expanding the scope of criminal liability based on ambiguous statutory language opens the door to "'arbitrary and discriminatory enforcement.'" *Skilling*, 561 U.S. at 402-03 (quoting *Kolender*, 461 U.S. at 357). It would "allow[] policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (quotation marks omitted).

Prosecutors in particular exercise broad unreviewable discretion with respect to their charging decisions. E.g., *Heckler* v. *Chaney*, 470 U.S. 821, 828-38 (1985). The only practically effective limits on that discretion—because the overwhelming number of criminal cases are resolved through plea bargains—are the constraints imposed by statutory definitions of criminal offenses.

Justice Scalia recognized this reality during the *Yates* oral argument earlier this Term:

> [I]f * * * the Justice Department's position [is to charge the most serious offense possible], then we're going to have to be much more careful about how extensive statutes are. I mean, if you're saying we're always going to prosecute the most severe, I'm going to be very careful about how severe I make statutes.

11/5/14 Tr. 28-29, at 2014 WL 7661639; cf. *United States* v. *Stevens*, 559 U.S. 460, 480 (2010) (declining to "uphold an unconstitutional statute merely because the Government promised to use it responsibly").

The Court has in recent years been required to rein in a number of attempts by the government to expand the scope of criminal liability beyond a statute's plain language. *Yates*, 135 S. Ct at 1088 ("In determining the meaning of 'tangible object' in [18 U.S.C.] § 1519. 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'"); *Burrage* v. *United States*, 134 S. Ct. 881, 887, 892 (2014) (interpreting statute imposing mandatory minimum sentence when "death or serious bodily injury results from the use of [a controlled] substance" to require proof that prohibited conduct was a but-for cause of death, rather than a contributing cause, because the latter construction "cannot be squared * * * with the need to express criminal laws in terms ordinary persons can comprehend") (quotation marks omitted); *Skilling*, 561 U.S. at 402, 411 (holding that statute criminalizing "a scheme or artifice to deprive another of the intangible right of honest services" "does not encompass conduct more wide-ranging than the paradigmatic cases of bribes and kickbacks"—and rejecting the government's more expansive interpretation—"absent Congress' clear instruction otherwise") (quotation marks omitted); *Carr* v. *United States*, 560 U.S. 438, 441-58 (2010) (plain text of statute precludes government's interpretation that sex-offender registration statute criminalizes pre-enactment interstate travel); *Cleveland*, 531 U.S. at 25 ("property" in mail fraud statute does not include state license because "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'"); cf. *Mellouli* v. *Lynch*, 2015 WL 2464047, at *9 (2015) (state drug paraphernalia conviction does not require alien's removal

because it does not qualify as a conviction under a law "relating to a controlled substance").

Here too, the court of appeals failed to adhere to this basic interpretive principle when it upheld the government's expansive construction of the Hobbs Act.

The statute defines "extortion" as "the obtaining of property from another, with his consent * * * under color of official right." 18 U.S.C. § 1951(b)(2). The substantive offense therefore plainly does not extend to individuals alleged to have paid a bribe. *Evans* v. *United States*, 504 U.S. 255, 260 (1992) ("At common law, extortion was an offense committed by a public official who took 'by colour of his office' money that was not due to him for the performance of his official duties.").

The statutory language also imposes criminal liability on persons who "conspire[] to do so" (18 U.S.C. § 1951(a))—in other words, who conspire to commit "extortion." But that authorization of conspiracy liability does not override the extortion offense's requirement that the property be obtained "from another"—from a third party. See *Sekhar* v. *United States*, 133 S. Ct. 2720, 2725 (2013) ("[o]btaining property" in the Hobbs Act "requires that the victim 'part with' his property, * * * and that the extortionist 'gain possession' of it").

Even if "from another" were ambiguous in the context of the conspiracy offense, the requirement of fair notice and the rule of lenity would require that the statute be given the less expansive interpretation. The provision accordingly must be interpreted to permit a conspiracy offense only when property is

obtained, or sought to be obtained, from an individual who is not a member of the alleged conspiracy.

Indeed, application of these principles is particularly important in the context of conspiracy offenses, because conspiracy statutes pose a special risk to individual liberties. Justice Jackson famously warned that the "federal law of conspiracy" was an

> elastic, sprawling and pervasive offense. Its history exemplifies the tendency of a principle to expand itself to the limit of its logic. The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

Krulewitch v. *United States*, 336 U.S. 440, 445-46 (1949) (Jackson, J., concurring in judgment) (quotation marks and footnotes omitted). Adopting Justice Jackson's framework, the Court subsequently stated that "cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404 (1957). The "[t]oo easy abuses to which a charge of conspiracy may be put" give special weight to applying the rule of lenity in this context. *Von Moltke* v. *Gillies*, 332 U.S. 708, 727 (1948) (opinion of Frankfurter, J.)

The court below compounded its failure to adhere to these basic principles for interpreting criminal statutes by devising its own, extra-statutory, limitation on the scope of the conspiracy offense. The court

held, in *United States* v. *Spitler*, 800 F.2d 1267 (4th Cir. 1986), that a conspiracy offense will lie when the individual who "part[s] with" the property "exhibits conduct more active than mere acquiescence" in making a payment—because "he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy." *Id.* at 1276. The court acknowledged that defining "the degree of activity necessary" to qualify as "a victimizer" was a significant question, but declined to "declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim." *Id.* at 1277-78.

The lower court adhered to the same approach in the present case. Pet. App. 19a-25a. It again held that the person who parts with his or her property is subject to conspiracy liability only when he or she engages in "active solicitation and inducement"—but declined to define the parameters of that requirement. *Id.* at 20a-21a.

This case thus provides a paradigmatic example of the consequences that result when courts expand the scope of federal criminal liability beyond the scope permitted by a statute's unambiguous language, and then try to limit the damage by creating their own limitations on the reach of criminal liability. Not only is the requirement of fair notice eviscerated, but criminal liability turns on determinations made by judges rather than Congress.

This Court should reaffirm the principle that criminal liability is limited by the unambiguous meaning of the text enacted by Congress.

B. The Court Should Not Construe The Hobbs Act To Intrude Upon An Area Traditionally Reserved To State Law.

This Court has consistently rejected constructions of federal criminal statutes that would "render * * * 'traditionally local criminal conduct' * * * 'a matter for federal enforcement.'" *Jones* v. *United States*, 529 U.S. 848, 858 (2000) (quoting *Bass*, 404 U.S. at 350). "'[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Ibid.* (quoting *Bass*, 404 U.S. at 349).

The Court applies this principle because "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States." *Bass*, 404 U.S. at 349. It therefore "insist[s] on a clear indication that Congress meant to reach purely local crimes, before interpreting [a] statute's expansive language in a way that intrudes on the police power of the States." *Bond* v. *United States*, 134 S. Ct. 2077, 2090 (2014).

In *Bass*, the Court refused to interpret the federal statute to criminalize "mere possession" of a firearm, because such an offense fell within the area of traditional state authority. 404 U.S. at 350. That expansive interpretation of the statute would "render[] traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." *Ibid.*

The Court reached a similar conclusion in *Jones* with respect to the federal arson statute. Under the government's "expansive" interpretation, the Court observed, "hardly a building in the land would fall outside the federal statute's domain." *Jones*, 529 U.S.

at 857. Characterizing arson as "a paradigmatic common-law state crime," the Court rejected the interpretation of the statute that would change the federal-state balance by "mak[ing] virtually every arson in the country a federal offense." *Id.* at 858-59; accord, *Cleveland*, 531 U.S. at 24-27 (refusing to construe federal mail fraud statute to criminalize false statements on state license applications).

Just last Term, in *Bond* v. *United States*, 134 S. Ct. 2077 (2014), the Court again applied this basic principle of statutory construction. The criminal law at issue in that case made it an offense knowingly to "own, possess, or use, or threaten to use, any chemical weapon." 18 U. S. C. § 229(a)(1). The Court held that the statute did not encompass the use of chemicals to effect an assault motivated by the desire for vengeance arising out of a personal dispute. Under the government's broad interpretation of the statute, "'hardly' a poisoning 'in the land would fall outside the federal statute's domain.'" *Bond*, 134 S. Ct. at 2092 (quoting *Jones*, 529 U.S. at 857). After surveying its prior decisions in *Bass* and *Jones*, the Court refused to "transform the statute from one whose core concerns are acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults" in the absence of a clear expression of congressional intent, because that result would "upset the Constitution's balance between national and local power." *Id.* at 2091-93.

The government's expansive construction of the Hobbs Act would produce exactly the same result. Every individual alleged to have bribed any government official would become subject to federal prosecution on a conspiracy charge—even though such an

individual concededly could *not* be charged with the substantive offense.

A divided Court held in *Evans* that a public official's *receipt* of a bribe constitutes "extortion" in violation of the Hobbs Act—even if the public official did not solicit or otherwise initiate the payment. 504 U.S. at 265-68; see also *id.* at 278-85 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting) (extortion requires proof of inducement and proof that payment was obtained under the pretense that the official was legally entitled to the payment).

The dissenting Members of the Court expressed concern that the Court's decision ratified an expansive interpretation of the Hobbs Act that had produced "a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws—acts of public corruption by state and local officials." *Evans*, 504 U.S. at 290. It was therefore "repugnant * * * to basic tenets of federalism." *Ibid.*

The construction of the Hobbs Act urged by the government in this case would intrude even further into state prerogatives. *Evans* did not extend federal criminal liability to the private party alleged to have paid a bribe. See 504 U.S. at 283 (dissenting opinion) ("Where extortion is at issue, the public official is the sole wrongdoer; because he acts 'under color of office,' the law regards the payor as an innocent victim and not an accomplice."); *McCormick* v. *United States*, 500 U.S. 257, 279 (1981) (Scalia, J., concurring) (extortion laws "punish[] * * * only the person receiving the payment," while bribery laws punish the person receiving the payment and "the person making it").

The government's theory here—interpreting the conspiracy offense created by the Hobbs Act to include a "conspiracy" between the person receiving the bribe and the person paying it—would expand the reach of federal criminal law to encompass those individuals. Any allegation of bribery of any state or local official could be charged as a Hobbs Act conspiracy.

In *Cleveland*, the Court refused to interpret the federal mail fraud statute to encompass false statements in connection with applications for a state gambling license on the ground that "[e]quating issuance of licenses or permits with deprivation of property would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities." 531 U.S. at 24. It held that recognizing a federal offense would "'significantly change[] the federal-state balance in the prosecution of crimes'" and that Congress had not clearly expressed its intent to do so. *Id.* at 25.

States obviously have well developed systems of laws criminalizing bribery of their public officials. A federal offense encompassing the very same conduct would intrude directly on an area of traditional state concern—punishing attempts to corrupt state and local officials. *Fischer* v. *United States*, 529 U.S. 667, 681 (2000) (refusing to construe federal anti-bribery statute broadly because "[d]oing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance").

There is no evidence that the Congress that enacted the Hobbs Act intended to confer upon federal prosecutors expansive authority to target anyone alleged to have bribed a state or local official.

The Hobbs Act was preceded by the Anti-Racketeering Act of 1934, which was enacted by Congress to impose federal criminal liability for the activities of violent criminal gangs. The House Committee on the Judiciary had "set forth without comment a letter from the Attorney General" explaining that "the purpose of the legislation is * * * to set up severe penalties for racketeering by violence, extortion, or coercion, which affects interstate commerce." *United States v. Local 807 of Int'l Bhd. of Teamsters*, 315 U.S. 521, 529-30 (1942). And one senator submitted a report referring to the Anti-Racketeering Act as one of several efforts to "render more difficult the activities of predatory criminal gangs of the Kelly and Dillinger types." *Id.* at 530.

The statute included an exemption for "bona fide labor activities" that this Court in *Local 807* interpreted to exempt all organized labor activities. 315 U.S. at 531.

Congress enacted the Hobbs Act to overrule this decision. *Evans*, 504 U.S. at 263. There is no evidence whatever that the Hobbs Act's inclusion of the term "extortion" and the addition of a conspiracy offense—neither of which was present in the Anti-Racketeering Act—were intended to expand federal law into areas traditionally reserved to the states, such as every alleged bribe of a state or local official.

Indeed, it is noteworthy that when Congress has legislated in this area, it has imposed limitations on the scope of federal criminal liability and imposed significantly lower penalties. See 18 U.S.C. § 666; Pet. Br. 25-26, 34.

This Court recently rejected a similar effort to adopt an overbroad construction of the Hobbs Act,

holding in *Sekhar* that the term "obtaining of property from another" did not encompass compelling an individual to recommend that his employer approve an investment because the recommendation did not constitute transferable property. 133 S. Ct. at 2725. Given the dramatic intrusion on traditional state law enforcement authority that would result from acceptance of the government's expansive construction of the statute, it should reject the government's position here as well.

The dissenters in *Evans* cautioned that "'[c]ourts must resist the[] temptation [to stretch criminal statutes] in the interest of the long-range preservation of limited and even-handed government.'" 504 U.S. at 295 (quoting *United States* v. *Mazzei*, 521 F.2d 639, 656 (3d Cir. 1975) (en banc) (Gibbons, J., dissenting)). The court below, and the government, fell victim to that temptation in this case. This Court should restore the Hobbs Act's conspiracy offense to the more limited scope enacted by Congress.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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